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THE AIR BRIDGE DENIAL PROGRAM AND THE SHOOTDOWN OF CIVIL AIRCRAFT UNDER INTERNATIONAL LAW

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August 2004**

**A thesis submitted to the Faculty of Graduate Studies and Research in
partial fulfillment of the requirements of the LL.M. degree**

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McGill University, Montreal**

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Abstract

In August 2003, the United States resumed the sharing of real-time intelligence with Columbia, information that will be used by Columbia to shoot down aircraft engaged in drug trafficking. A similar program with Peru may restart soon. Such operations are part of the Air Bridge Denial Program (ABDP), a program that has been operating since the early 1990s designed to cut off the flow of drug out of the Andean Region of South America.

This thesis examines the history of the ABDP and the norms applicable to shootdown operations under the UN Charter, customary international law, the Chicago Convention, and human rights law to determine the specific limitations of the prohibition. International law generally prohibits the shootdown of international civil aircraft, and the nature of the shootdown operations can also have human rights implications.

This thesis then examines the circumstances under which international law would excuse an otherwise unlawful shootdown of a civil aircraft. Self-defense, the law of armed conflict and distress are ruled out as likely candidates for use in the legal justification of the shootdown of drug aircraft.

The best defense for the conduct of ABDP shootdowns is the defense of necessity as it exists under customary international law. The potential harm to the essential interests of States threatened by drug trafficking combined with the unique nature of the drug trade in the Andean Region is the ideal situation for the invocation of necessity and provides the most sound international legal justification for the conduct of shootdown operations in this context.

Abstract

En août 2003, les États-Unis ont repris les échanges d'informations en temps réel avec la Colombie qui les utilise pour abattre les avions impliqués dans le trafic de drogue. Il se peut qu'un programme similaire soit à nouveau mis en œuvre avec le Pérou. De telles opérations font partie du programme Air Bridge Denial Program, un programme mis en place au début des années 1990 et conçu pour stopper l'afflux de drogues en provenance de la région des Andes en Amérique du Sud.

La présente thèse examine l'histoire de ce programme et les normes applicables aux opérations de destruction d'avions en vol d'après la Charte des Nations Unies, le droit coutumier international, la Convention de Chicago et les droits de l'homme afin de déterminer les limites spécifiques concernant l'interdiction d'abattre des avions en vol. La loi internationale interdit généralement la destruction d'avions civils. En outre, de telles opérations peuvent également avoir des répercussions sur le plan des droits de l'homme.

Elle analyse ensuite les circonstances qui pourraient justifier aux yeux de la loi internationale un tel acte, considéré en toutes autres occasions comme illicite. L'auto-défense, la loi réglementant les conflits armés et le désarroi ne peuvent être utilisés pour justifier la destruction d'un avion transportant de la drogue.

La meilleure défense de ce programme réside dans la nécessité telle qu'elle est définie par le droit coutumier international. Les dommages potentiels occasionnés aux intérêts primordiaux des États menacés par le trafic de drogue ainsi que la nature unique du commerce de la drogue dans cette région sont autant d'éléments qui permettent d'invoquer la notion de nécessité et de justifier pleinement, au niveau du droit international, le recours à des opérations de destruction.

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The Air Bridge Denial Program and the Shutdown of Civil Aircraft under International Law

I. Introduction

In August 2003, President George W. Bush signed off on a plan paving the way for the resumption of a key part of counter-drug operations in Columbia, a plan that would once again allow Columbia to use real-time U.S. intelligence to track, intercept and even shootdown aircraft suspected of carrying drugs.¹ The recommencement of similar operations with Peru in the near future is planned, and the initiation of such an operation with Brazil is now under discussion. These types of operations have proven quite effective in their ability to deter airborne drug traffickers.

The shootdown of suspected drug aircraft by countries such as Columbia and Peru is not new, but the success of such operations relies heavily on the airborne tracking and intelligence that only the United States is equipped to provide. This U.S. support was suspended for more than two years in the wake of an unfortunate incident in Peru. On 20 April 2001, a Peruvian A-37 interceptor, operating as part of a joint U.S.-Peruvian counter-narcotics mission, fired two salvos of machine gun fire into a small Cessna float plane, registration number OB-1408,² after it had been identified as a probable drug trafficking aircraft. After being hit, the pilot of the damaged aircraft managed to make an emergency landing on the Amazon River. Unfortunately, the shootdown would not prove to be another victory in the war on drugs. OB-1408 was not a drug plane; it was

¹ See Stephen J. Hedges "U.S., Columbia to Resume Air Patrols; Anti-Drug Flights Halted in '01 After Missionary's Death" *Chicago Tribune* (20 Aug 2003) 3.

² The designation "OB" indicates a Peruvian-registered aircraft.

operating as part of an American Baptist Missionary Group. Two people on the flight were killed, a U.S. missionary and her infant daughter, both killed by the gunfire from the Peruvian aircraft.

This incident was the low-water mark in the history of the Air Bridge Denial Program (ABDP). The ABDP had long operated as one part of a larger "war on drugs." The target of this war, the drug trade in South America, has not only been found to be a threat to the national security of the United States, it is known to support such terrorist and insurgent groups as the Revolutionary Armed Forces of Columbia (FARC) and the Sendero Luminoso (SL) or "Shining Path" group of Peru, both insurgent forces responsible for enormous suffering in these countries. In this sense, the "war on drugs" is a branch of the "war on terror."

While the shootdown of civil aircraft engaged in drug running dates back at least to the early 1990s, the ABDP has been officially involved in the shootdown of suspect aircraft, with the participation of the United States, since 1995. Despite objections from the Defense Department and from other Cabinet Agencies, this shootdown component was introduced to on-going interdiction operations by the Governments of Columbia and Peru, a move to which the U.S. acquiesced after Congress cleared the perceived domestic legal obstacles to U.S. participation. Until the shootdown of OB-1408 in 2001, the interceptor forces of Columbia and Peru had shot down, forced down or strafed with gunfire a number of civil aircraft suspected of carrying illegal drugs on the basis of real-time intelligence provided by entities of the United States Government.

While one cannot argue with the general success of the shootdown component of the ABDP, the shootdown of civil aircraft has long been a touchy issue. From the

beginning of the Cold War, the U.S. had maintained a consistently negative attitude toward the use of weapons against civil aircraft in flight,³ a disapproval that peaked in 1983 when the Soviet Union shot Korean Airlines Flight 007 (KAL 007) out of the sky after it intruded into Soviet airspace. Despite the U.S. itself being involved on the trigger end of the 1988 shootdown of Iran Air flight 655, this disapproval of using weapons against civil aircraft in flight continued, particularly in reaction to the Cuban shootdown of civil aircraft belonging to the Brothers to the Rescue (BTTR) Group in 1996. The U.S. is not alone on this issue. As evidenced by the reaction to the KAL 007 and the BTTR shootdowns, as well as other incidents, it is safe to say that the international community as a whole generally abhors the shootdown of civil aircraft; nevertheless it has remained surprisingly silent on the issue of ABDP shootdowns. While there has been no large scale outcry over the shootdown operations being conducted in the skies over South America, there are potential international legal problems inherent in these shootdowns.

Along with questions specific to ABDP operations are more questions regarding the shootdown of civil aircraft generally. What exactly does international law forbid? What defenses to internationally wrongful conduct could potentially excuse the shootdown of a civil aircraft? Is it a violation of international law for a State to shootdown planes suspected of carrying illegal drugs even when the operation is conducted in that State and is targeted against an aircraft registered in that State? Are there previously unaddressed human rights concerns with shootdown operations? Can such operations go beyond targeting drugs to target perhaps illegal weapons, weapons of mass destruction (WMDs) and missile technology transfers, or even terrorists themselves aboard civil aircraft in flight? The implications of these answers will not only affect the

³ See U.S., *Cong. Rec.*, vol. 140 at 12785 (12 September 1994) (Sen. Kassebaum).

international perception of the legality of ABDP shootdowns, but will also clarify the law relating to other possible uses of force against civil aircraft in the now nearly three-year-old “war on terror.”

ABDP shootdowns have escaped international legal analysis largely due to the fact that the States involved have asserted “sovereignty” in order to deal with aircraft over their territory as they see fit. However, as we will see, the drug operations that are the target of the ABDP are inherently international and invoke international legal concerns that far surpass the reaches of sovereignty. To ignore the shootdown of these aircraft is to ignore the development of international law.

In the examination of today’s potential shootdown situations, one must do away with the mentality that was pervasive during the Cold War and with the KAL 007 shootdown specifically. The shootdown of KAL 007 along with several other shootdown events of the Cold War have the similarity of being “intrusion shootdowns.” The aircraft were targeted with deadly force solely for *where* they were (in most cases, illegally flying over repressive Eastern Bloc countries), not for *what* they were doing. An international legal consensus has developed holding that intrusion shootdowns are *per se* illegal under international law.

Modern analysis must move beyond the “intrusion shootdown” mindset and take a close look at the *what* and not the *where*. The ABDP shootdowns target the actions of drug traffickers and the threats posed by their flights; therefore, the legality of these operations must be analyzed from that viewpoint. While this post-Cold War evolution in analysis is needed, one must be mindful that such analysis could have repercussions for civil aviation and for international law issues across the board, especially in the midst of

the international upheaval that has resulted from the “war on terror.”

Part II of this work will examine the history of the ABDP shutdown operations, from their inception to the 2003 resumption of operations as well as the success of these operations. Part III will examine the various sources of international law relating to the use of force against civil aircraft and will attempt to distill some specific rules that are applicable to the legal analysis of ABDP operations and shutdowns in general. Part IV of this work will look at the circumstances under international law in which a State may be relieved of its international obligations, focusing on the options that could be used to justify the shutdown of civil aircraft under international law and will seek to apply the law and the exceptions to the law in an effort to determine the international legality of the ABDP shutdowns. Part V recognizes that the ABDP will not operate in a vacuum and examines some other legal issues relevant to the evolution of international law in this area.

II. The History of the Air Bridge Denial Program and the Shutdown of Suspected Drug Aircraft

The Air Bridge Denial Program derives its name from its goal: to deny the South American drug network the “air bridge” it uses to transfer semi-refined cocaine from growing areas in rural Peru, Bolivia, and Columbia to processing plants in Columbia and onward to destination countries, such as the United States and the countries of the European Union. While this transportation network also includes land and water routes, its lifeblood is aerial transportation. At times, almost 90 percent of the drug trafficking operations between Peru and Columbia have been conducted by air.⁴ The denial of this

⁴ See U.S., General Accounting Office, *U.S. Drug Interdiction Issues in Latin America*, (GAO/T-NSIAD-95-32) (1994) at 1, online: Federation of American Scientists <<http://www.fas.org/irp/gao/ansi95032.htm>>

air bridge, initially through the interdiction of suspect planes on the ground and later through the use of weapons against aircraft in flight, has been a vital tool in the fight against drugs. It is seen as a key component of the overall success of U.S. counter-drug operations. However, while this component has had a long and successful history, it has been controversial.

A. Early Counter-Drug Operations in South America

The phrase “war on drugs” was made popular during the boom days of the mass importation of Latin American cocaine into the United States in the late 1980s. Though it was first seen as a law enforcement problem, the true nature of the enemy and the profound impact the drug trade has had on the United States and certain Andean countries changed the paradigm. The production and international transshipment of cocaine, along with other illegal drugs including heroin, morphed into a national security problem, necessitating involvement from more than just police forces and the U.S. Coast Guard. This morphing of the nature of drug trafficking prompted the entry of the U.S. armed forces and intelligence services and gave birth to what would become the ABDP.

1. The Origin of the Program

There has been a constant U.S. counter-drug presence in Latin America since at least the early years of the Reagan Administration. Starting in 1985, the U.S. began funding Peruvian operations, code-named “Condor,” aimed at destroying airstrips used by drug-running aircraft, hoping to destroy the pillars of the air bridge.⁵ Along with “Condor” came increased logistical and intelligence support from the United States. The

[*Testimony of Joseph E. Kelley*] (Statement of Joseph E. Kelley, Director-in-Charge, International Affairs Issues, National Security and International Affairs Division, Testimony Before the Legislation and National Security Subcommittee, Committee on Government Operations, House of Representatives).

⁵ See JoAnn Kawell, “Closing the Latin American Air-Bridge: A Disturbing History” (May 2001), online: Foreign Policy in Focus <www.fpiif.org/pdf/gac/0105airbridge.pdf>.

increased military nature of the operations began in 1989 with President George H. W. Bush's so-called "Andean Initiative." This initiative involved the deployment of seven Special Forces teams and approximately 100 military advisors to Columbia, Bolivia, and Peru to train the armies of the region to fight the drug war.⁶

Beginning in the early 1990s, the United States Southern Command, the Unified Command having control over all U.S. military operations in Latin America, began a program called "Support Justice" to assist in the aerial monitoring of the air bridge. This was to be the first large scale "hands on" participation by the U.S. in the fight against drugs. "Support Justice" used military P-3 and AWACS surveillance aircraft, the goal of which was to "confirm anecdotal law enforcement information regarding the frequent use of small private aircraft to move . . . cocaine" and to "provide objective data on the non-commercial routes being used by trafficking aircraft, the flight times, departure points and final destinations."⁷ Peru used this information to implement a program of interdiction at the points of departure and arrival of suspect aircraft, thereby avoiding the need to use force against drug trafficking aircraft in flight.⁸ While "Support Justice" provided much needed intelligence and surveillance support to Peru, the focus of the United States was about to move far beyond "Support Justice" levels with the Presidential election of 1992.

⁶ See U.S., Congressional Research Service, *Instances of Use of United States Armed Force Abroad, 1978-1999* (1999).

⁷ U.S., Department of State, *Peru Investigation Report: The April 20, 2001 Peruvian Shootdown Incident* (2001), online: Federation of American Scientists <http://www.fas.org/irp/news/2001/08/peru_shootdown.html> [State Department Peru Report]. The major operations under this code name were Support Justice III, September 1991 – April 1992 (halted when a U.S. C-130 was fired upon by Peruvian jets), and Support Justice IV, November 1992 – May 1994. See U.S., Institute for Defense Analysis, *Deterrence Effects and Peru's Force-Down/Shoot-Down Policy: Lessons Learned for Counter-Cocaine Interdiction Operations*, (2000) at 18 [Deterrence Effects].

⁸ See *State Department Peru Report*, *supra* note 7.

2. The Introduction of a Shootdown Component

While both the Reagan and Bush administrations had focused on countering the South American drug trade under operations such as "Condor," the "Andean Initiative," and "Support Justice," President Clinton was determined to take the fight directly to the enemy. In 1993, the focus of the U.S. war on drugs turned south when President Clinton signed Presidential Decision Directive 14 (PDD 14).⁹ PDD 14 shifted the focus of U.S. counter-drug operations from the "transit zone in the Caribbean Sea and the Gulf of Mexico to the source zone, chiefly Columbia, Peru and Bolivia."¹⁰

Not only did the focus move south, but the U.S. began using ground radar stations and aerial tracking platforms to provide real-time intelligence for the interception of suspect aircraft.¹¹ Peru and Columbia used this information to go one step beyond Washington's intent in the provision of real-time intelligence. In 1993, Peru began the implementation of Peruvian Decree Law Number 25426, under which the government authorized for the first time the use of force against suspected drug aircraft in flight.¹² In early 1994, Columbia confirmed to State Department officials their intention to implement a similar program. In 1990, the Colombian government had conceived of a nearly identical shootdown program, the implementation of which had been suspended under U.S. pressure.¹³

⁹ See U.S., The White House, Office of the Press Secretary, *Press Release Regarding Presidential Decision Directive 14*, (1993), online: Federation of American Scientists <www.fas.org/irp/offdocs/pdd14.htm>.

¹⁰ U.S., Senate Committee on Intelligence, *A Review of United States Assistance to Peruvian Counter-Drug Air Interdiction Efforts and the Shootdown of a Civilian Aircraft on April 20, 2001*, (2001) at 3 [Senate Peru Report].

¹¹ See *State Department Peru Report*, *supra* note 7.

¹² See *Senate Peru Report*, *supra* note 10 at 3.

¹³ See U.S., Department of State, *Revised Colombian Interception Procedures* (1994Bogata01852) (1994) at 2, online: The National Security Archive <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB44/doc1.pdf>> [February 1994 Bogotá Cable] (Cable sent from the U.S. Embassy in Bogotá to the U.S. Secretary of State). The idea of resorting to the use of

While the Colombian shootdown plan of 1990 had been shelved, by 1994 neither Columbia nor Peru would be deterred in their plans to add a shootdown component in an effort to cut off the air bridge. General Victor Villanueva, Peruvian Minister of Defense demonstrated his country's unwillingness to be deterred by Washington by responding to an American request for assurances that Peru would not use U.S.-provided intelligence to attack civil aircraft in flight by saying that Peru would continue to "frontally combat, with the means of which it itself disposes, against illicit trafficking in drugs within the parameters of its internal legal regime..."¹⁴ An official from the Colombian Ministry of Defense responded to a similar American inquiry by asserting that Columbia's sovereign right to enforce its laws included the right to implement a shootdown policy.¹⁵ When Peru went ahead with its plan to shootdown civil aircraft, even members of the ever-critical U.S. State Department agreed that it worked to cut off the air bridge.¹⁶

The shootdown plans of Columbia and Peru were similar. The Colombian plan called for a graduated approach to the interdiction of suspect aircraft. Aircraft operating in restricted zones would be contacted by radio and given appropriate instructions, and if

weapons against airborne drug traffickers was not new, and it is not just a Colombian or Peruvian idea. A law sponsored by a U.S. Senator would have allowed U.S. law enforcement to use force against suspected drug aircraft in flight. That effort was strongly opposed by the Department of State in 1989, and the bill never became law. See U.S., Department of State, *Position Paper on the Use of Weapons Against Aircraft Suspected of Carrying Drugs*, (1989) [October 1989 Position Paper], contained at Tab 1 of U.S., Department of State, *Forcedown Policy: Options for Columbia and Peru* (1994), online: The National Security Archive <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB44/doc2.pdf> [October 1989 Position Paper].

¹⁴ U.S., Department of State, *Suspension of Provision of DOD Real-Time Radar Track Data to Peru* (1994Lima04197) (1994) at 2-3, online: The National Security Archive <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB44/doc5.pdf>> (Message from U.S. Embassy in Lima to the U.S. Secretary of State).

¹⁵ See *February 1994 Bogotá Cable*, *supra* note 13, at 5.

¹⁶ See U.S., Department of State, *Use of Weapons Against Civil Aircraft*, (1994) at 3, online, The National Security Archive <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB44/doc7.pdf> [May 1994 Shootdown Memo to U.S. Secretary of State].

it did not respond, an interception would follow using ICAO procedures.¹⁷ If it continued to ignore instructions, it would be considered “hostile” and would be subject to warning shots and disabling fire.¹⁸ The Peruvian plan called for similar procedures, including as well the compliance with ICAO procedures and the requirement for high level authorization before a shootdown could take place.

3. The 1994 Interruption of Real-Time Intelligence

The nascent shootdown program proved enormously effective in Peru early on, and by some accounts Peru shot down over 30 aircraft while tracking and stopping an additional 190.¹⁹ With its budding success, legal questions surrounding the Columbian and Peruvian shootdown policies might very well have been ignored by the U.S. government, but for an opinion by lawyers at the Department of Defense (DoD) warning that U.S. forces supplying the real-time information to the Columbian and Peruvian forces could be subject to criminal prosecution under U.S. domestic law. The possibility of U.S. forces being prosecuted in Federal Court for conducting their assigned military duties was enough for the DoD to immediately implement an interruption in cooperation with Columbia and Peru. On 1 May 1994, the DoD unilaterally cut off a number of assistance programs with these countries. The DoD initially stopped all air intelligence activities and shut off all ground radar stations, even going so far as to forbid intelligence

¹⁷ See U.S., Department of State, *Office of the President, Press Bureau, Ministry of National Defense, Information and Press Office, Press Release* (1994) at 2, online: The National Security Archive <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB44/doc3.pdf>> [Translation of March 1994 Columbian Press Conference] (Translation of Columbian press release from the Columbian President and Ministry of National Defense by Department of State Office of Language Services). ICAO procedures are contained in Annex 2 to the Chicago Convention and are discussed in more detail below.

¹⁸ See *Translation of March 1994 Columbian Press Conference*, *supra* note 17 at 2.

¹⁹ See U.S., *Cong. Rec.* vol. 140 at 8254-55 (1 July 1994) (Sen. John Kerry). Another count had Peru having shot down 41 aircraft from 1992-94. See Eric Edward Geiser, “The Fog of Peace: The Use of Weapons Against Aircraft in Flight During Peacetime” (1998) 4 J. Int’l Legal Stud. 187 at 218 [Geiser, “Fog of Peace”].

sharing with other U.S. Government agencies, but the latter action was relaxed a few weeks later.

There was an angry response from both Peru and Columbia. The Columbian Minister of Defense reportedly “exploded” when told of the U.S. suspension.²⁰ The diplomats at the State Department, despite for their initial dislike of the operation, were also displeased with the DoD’s unilateral move. However, it did not go unnoticed by the drug traffickers, and drug flights immediately increased.²¹

Agreement with the DoD position that shootdown operations could expose U.S. forces to legal jeopardy was forthcoming from various U.S. government legal circles. Lawyers from the Departments of Justice, State, Defense, Treasury, and Transportation as well as from the Federal Aviation Administration concluded that U.S. support of shootdown operations was probably a violation of U.S. law.²² In a final opinion, the Office of Legal Counsel of the Department of Justice concluded that the ABDP operations supporting the shootdown of civil aircraft created substantial risk that such operations would constitute aiding and abetting a violation of the Aircraft Sabotage Act of 1984.²³ In its sweeping opinion, the DoJ stated that:

USG [United States Government] agencies and personnel may not provide information (whether ‘real-time’ or other) or other USG assistance (including training and equipment) to Columbia or Peru in circumstances in which there is a reasonably foreseeable possibility that such information or assistance will be used in shooting down civil aircraft, including aircraft suspected of drug trafficking.²⁴

²⁰ See *May 1994 Shootdown Memo to U.S. Secretary of State*, *supra* note 16 at 2.

²¹ See *Testimony of Joseph E. Kelley*, *supra* note 4 at 2.

²² See U.S., Department of Justice, Office of Legal Counsel, *United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking* (1994) at 2, online: U.S. Department of Justice <<http://www.usdoj.gov/olc/shootdown.htm>> [*Opinion of the Office of Legal Counsel*].

²³ Pub. L. No. 98-473, 98 Stat. 2187 (1984).

²⁴ *Opinion of the Office of Legal Counsel*, *supra* note 22 at 35.

In light of such an opinion, it was impossible to restart the cooperation without a change in U.S. law.

4. A Congressional Response

Concerns about the potential legal jeopardy faced by U.S. forces participation in foreign shootdowns would not stop U.S. participation in real-time intelligence sharing or any other assistance to Columbia and Peru under the ABDP for long. The Clinton Administration exerted extreme pressure to restart the sharing of intelligence, but the lawyers in the DoD needed legal protection for the forces providing the support. These competing concerns spawned an interagency review to find ways to resume the support while immunizing U.S. participants.

What resulted from the interagency meetings was proposed legislation that provided immunity for those participating in certain authorized shootdown operations. It quickly ended up in Congress as an amendment to the 1995 National Defense Authorization Act, sponsored by Senator John Kerry of Massachusetts, a strong supporter of the shootdown operations.²⁵ He had previously echoed the State Department's criticism of the DoD's decision to end cooperation with Columbia and Peru, saying that it "cut off at the knees a program that was working."²⁶ He firmly believed that the amendment was in compliance with international law, specifically citing the sovereign right of a State to act as it sees fit within its own territory.

²⁵ The amendment was not without its detractors, and the speed with which it came to a vote was duly noted. Senator Malcolm Wallop condemned the amendment, stating that it had been adopted "without the benefit of hearings and in the face of significant opposition by affected organizations" and that it "sets troubling precedents for U.S. and international law and contradicts key international conventions governing air safety...." U.S., *Cong. Rec.*, vol. 140 at S12771 (12 September 1994) (Sen. Malcolm Wallop). Another Senator stated her belief that the amendment set the stage for a "deadly game of chance," in effect authorizing the shootdown of civil aircraft on an "educated guess." U.S., *Cong. Rec.*, vol. 140 at S12785 (12 September 1994) (Sen. Nancy Kassebaum).

²⁶ U.S., *Cong. Rec.* vol. 140 at 8255 (1 July 1994) (Sen. John Kerry).

The legislation passed, and it was signed into law on 5 October 1994 as Section 1012 of the National Defense Authorization Act, entitled "Official Immunity for Authorized Employees and Agents of the United States and Foreign Countries Engaged in Interdiction of Aircraft Used in Illicit Drug Trafficking."²⁷ Section 1012(a) protected agents of foreign governments by providing that

[I]t shall not be unlawful for authorized employees or agents of a foreign country ... to interdict or attempt to interdict an aircraft in that country's territory or airspace if - (1) that aircraft is reasonably suspected to be primarily engaged in illicit drug trafficking; and (2) the President of the United States ... has determined with respect to that country that - (A) interdiction is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (B) the country has appropriate procedures in place to protect against the innocent loss of life²⁸

Protection for Employees and agents of the United States was also granted in subsection

(b), stating that it would not be unlawful to

provide assistance for the interdiction actions of foreign countries authorized under subsection (a), nor would "[t]he provision of such assistance give rise to any civil action ... against the United States or its employees or agents²⁹

In the amendment, the words "interdict" and "interdiction" were defined to include the destruction of aircraft in flight.³⁰

The Presidential determination as required under section 1012 was quickly forthcoming. On 1 December 1994, President Clinton signed a memorandum making the necessary determination regarding Columbia,³¹ and signed a nearly identical one a week

²⁷ Pub. L. 103-337, sec. 1012, 108 Stat. 2883 (1994).

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.* at sec. (c).

³¹ U.S., Office of the President of the United States, *Presidential Determination 95-7*, (Washington, D.C.: Office of the President, 1 December 1994).

later regarding Peru.³² Both determinations recognized the threat posed by drugs and found that steps were in place to prevent the shutdown of innocent civil aircraft. The memoranda signed by President Clinton contemplated that ICAO Intercept Procedures would be used in the operations.³³ Peru, for its part, complied, codifying the use of ICAO Intercept Procedures into Peruvian Law 24883 in late 1994.³⁴

While these determinations laid the foundations for putting the U.S. government back in the shutdown business, the legal success was a domestic one at best. The fact that international legal issues still lingered was not lost on the State Department.³⁵ Despite any potential international law issues, the U.S. resumed real-time intelligence sharing in 1995, for the first time under the name "Air Bridge Denial Program."³⁶

B. 1995 - Present

1. Six Years of Air Bridge Denial Operations

During the period after the resumption of intelligence sharing until 2001, the U.S. participated in 14 shutdown operations with the Peruvians, and the Peruvians claimed a total of 38 shutdowns overall.³⁷ The Columbians conducted an unknown number of shutdowns during this time, but most of their attacks were against aircraft already on the

³² U.S., Office of the President of the United States, *Presidential Determination 95-9*, (Washington, D.C.: Office of the President, 8 December 1994).

³³ See U.S., *Memorandum of Justification for Presidential Determination Regarding the Resumption of U.S. Aerial Tracking Information Sharing and other Assistance to the Government of Peru* (1994) at 2, contained at Tab D of Senate Peru Report, *supra* note 10 [*Presidential Justification Memo*].

³⁴ See *Senate Peru Report*, *supra* note 10 at 5.

³⁵ See U.S., Department of State, *Presidential Determination Demarche* (1994), online: The National Security Archive, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB44/doc13.pdf> [Presidential Determination Demarche].

³⁶ See *Senate Peru Report*, *supra* note 10 at 5.

³⁷ See *ibid.* at 10.

ground.³⁸ No other shootdown operations were in place elsewhere in the Andean Region during this period.

The deterrence effects of the operation and the potential for behavior modification on the part of drug runners is unquestionable. The mere perception that authorities might use force against suspected drug aircraft had an effect. Before an official shootdown policy was in place during one of the earlier "Support Justice" operations, an "accidental" shootdown of a trafficking aircraft alone led to a temporary 60% reduction in flights.³⁹ With the resumption of U.S. support in 1995, Peruvian interdiction of only 13% of all flights over the next 8 months had the effect of reducing trafficking flights by 64% overall.⁴⁰

While operations were ongoing in both Columbia and Peru, Peru saw the most dramatic decrease in the production of coca crops in response to the ABDP and other counter-drug programs. The cocaine market was crippled in that country, with farmers abandoning two-thirds of their fields.⁴¹ The effects felt in the U.S. were astonishing. After four years of ABDP operations, Cocaine prices in the U.S. dropped by 40%, and casual use dropped by 15%.⁴² Additionally, there was a corresponding rise in the U.S. street price for cocaine and a reduction in positive drug test rates.⁴³ The ABDP was credited as being "the only consistent and plausible explanation for the collapse of the illicit coca markets in Peru."⁴⁴

³⁸ See Geiser, "Fog of Peace" *supra* note 19 at 218.

³⁹ See *Deterrence Effects*, *supra* note 7 at IV-41.

⁴⁰ See *ibid.* at 2.

⁴¹ See *ibid.*

⁴² See *ibid.*

⁴³ See *ibid.*

⁴⁴ *Ibid.* at III-2.

Drug lords were quick to adapt. The program of interdiction forced production into a few “safe havens” in Columbia. The Putumayo and Caqueta regions of Columbia, isolated and, for all practical purposes, beyond the reach of the Colombian Government, saw a rapid rise in cocaine production after the implementation of the ABDP.⁴⁵ Success in slowing down production in one jurisdiction often leads to more production elsewhere, as drug lords have no use for international boundaries. Nonetheless, the shutdown program was an overall deterrent to drug traffickers and kept many of them from taking to the skies. With the success of the program came a slowdown in “end-game” operations in the late 1990s. Despite huge shutdown numbers initially, from 1998 to 2000 there was only one shutdown.⁴⁶ This was unquestionably the result of ABDP becoming a victim of its own success.

2. The Shutdown of OB-1408 on 20 April 2001

The string of successful operations was soon to draw to abrupt end. Jim and Veronica Bowers were American missionaries working in Peru. On 19 April 2001, they flew to Islandia, Columbia for the purpose of traveling from there overland to Leticia to obtain a Peruvian residency visa for their infant daughter from the Peruvian Consulate in Leticia. Piloting the aircraft, OB-1408, was Kevin Donaldson, an experienced pilot and veteran floatplane operator in the Peruvian jungle for the American Baptist Missionary Organization for over five years. Two days earlier, he had filed an oral flight plan with Peruvian authorities indicating the trip to and from Islandia.⁴⁷

Their flight to Islandia went as planned; however, the return trip was to be anything but routine. On 20 April 2001, OB-1408 left Islandia, where Donaldson had

⁴⁵ See *ibid.* at II-23.

⁴⁶ See *Senate Peru Report*, *supra* note 10 at 10.

⁴⁷ See *ibid.* at 20.

docked the aircraft the previous night, and flew at an altitude of 1000 feet due to adverse weather conditions. This altitude prevented him from contacting the Letecia tower and reporting his departure. When the weather cleared, he climbed to 4000 feet but was still unable to make radio contact with the proper authorities. Because OB-1408 was a floatplane, Donaldson needed to stay close to the Amazon River in case of an emergency, which made for an unusual flight path, actually necessitating a brief penetration of Brazilian airspace.⁴⁸

The unusual flight path of OB-1408 soon attracted attention. OB-1408 had been identified by U.S. and Peruvian authorities as a possible drug carrier and was being intercepted by Peruvian fighters. When the occupants noticed a Peruvian military jet following the aircraft, Donaldson radioed the Iquitos tower of his position and mentioned that he was being trailed by military jets.⁴⁹ After one pass underneath OB-1408 and without any visual signals, the jets opened fire. Mr. Donaldson frantically screamed on the radio to Iquitos tower, "They are killing us."⁵⁰ Shortly thereafter, the plane landed on the Amazon River near Pebas, and Veronica and Charity Bowers were dead.

3. 2001 to Today

In the wake of the tragedy that took two innocent lives, programs in both Peru and Columbia were suspended pending a review of safety procedures. After several years of fact-finding and diplomacy, no doubt lengthened by attention focused elsewhere, such as the 9/11 attacks and the wars in Afghanistan and Iraq, operations in Columbia have been restarted. Under the newly established rules, there must be one U.S. civilian monitor on

⁴⁸ See *Senate Peru Report*, *supra* note 10 at 20.

⁴⁹ See *ibid.* at 21. That very same controller had just before responded to a Peruvian military request for information on the location of OB-1408. That controller had reported that he was still on the water at Islandia, as Leticia air traffic control had not advised him of OB-1408's departure.

⁵⁰ *Ibid.*

board aircraft on interdiction missions, and there are checklists of steps that must be followed in shootdown situations.⁵¹

The program is already showing results in reducing drug production. The recommencement of U.S. cooperation led to the seizure of 18.5 tons of cocaine in its first nine months.⁵² Colombian forces have intercepted 26 aircraft, nine of which flew in from Brazil (a very important fact in the legal analysis), capturing 13 of them and destroying the other 13 on the ground.⁵³ No aircraft have been shot down so far.

Despite the success in Columbia, drug cultivation is on the rise in many other countries, including Peru and Brazil, two countries that are waiting to join in the shootdown game. Peru awaits a U.S. Presidential Determination, and Brazil is in the final stages of a law that would allow them to shoot down aircraft that enter Brazil and refuse to identify themselves and refuse orders to land.⁵⁴ Brazil has in fact firmly warned the U.S. that it will enact its own shootdown plan, with or without a Presidential Determination.⁵⁵

C. Legal Issues Still Unresolved

As the ABDP enters a new phase of operations, questions of domestic law remain largely a non-issue. However, questions of international law remain a holdover from the very commencement of shootdown operations. The U.S. Government, particularly the State Department, has sought an international legal basis for the ABDP since its very inception. A State Department cable to the U.S. Embassy in Bogotá shortly after the first

⁵¹ See "Drug-Runners Beware" *The Washington Times* (8 August 2003) A18.

⁵² See "Brazil: Visiting Colombian Delegation Explains Results of Shoot-Down Law" *BBC Worldwide Monitoring* (5 June 2004), online LEXIS (News) (Translated by the BBC from *Correio Braziliense*).

⁵³ See *ibid.*

⁵⁴ See *ibid.*

⁵⁵ See "Brazil: Ultimatum to US on 'Shootdown' Law" *Latin America Weekly Report* (1 June 2004), online: LEXIS (News).

restarting of ABDP recognized the importance of an international legal justification. "Now that we have resumed the sharing of intelligence, it is important that we work carefully to gain acceptance by the international legal system of what we are doing (I.E., Article 89)."⁵⁶ Even Senator Strom Thurmond, never one to be overly concerned about international law, worried that the shootdowns would expose U.S. persons to international liability.⁵⁷

One means of achieving international acceptance was to seek the creation of a narrow exception in international law where "drug trafficking threatens the political institutions of a state and where the country imposes strict procedures to reduce the risk of attack against non-drug trafficking aircraft."⁵⁸ Such an exception has never been articulated by any legal authority, nor has it achieved international recognition. This work will search international law in an effort to find an exception that will justify the shootdown component of ABDP operations.

III. International Law Governing the Shootdown of Civil Aircraft

International law is the law that governs relations among nations and is based on the consent of sovereign States by their status as State parties to international conventions or by their conduct amounting to customary international law. International law may be

⁵⁶ *Presidential Determination Demarche*, *supra* note 35. Similar indications are contained in *May 1994 Shootdown Memo to U.S. Secretary of State*, *supra* note 16 at 4.

⁵⁷ See U.S., *Cong. Rec.*, vol. 140 at S8222 (1 July 1994).

⁵⁸ U.S., Department of State, *Implementing the President's Decision on Columbia Peru Forcedown Policy* (1994) at 2-3, online: The National Security Archive <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB44/doc10.pdf>> [*June 1994 Memo to Secretary of State*] (Decision Memorandum to Secretary of State Warren Christopher concerning drug aircraft shootdowns).

ascertained from various sources.⁵⁹ Since the birth of aviation, especially since the Second World War, a great deal of international law has developed relating to the use of weapons against civil aircraft in flight. The majority of international law in this area is either part of customary international law or is codified in international conventions.

A. United Nations Charter

1. Prohibition on the Use of Force under Article 2(4)

The UN Charter is at the apex of international law. The obligations assumed by States under the Charter trump all other conflicting obligations.⁶⁰ When determining the limits to be placed on a State's ability to project force against another State, including perhaps the use of force against civil aviation, the primary authority is the UN Charter. Under the Charter, the use of force against another State is prohibited unless it is conducted in self-defense or in accordance with Chapter VII of the Charter.

Article 2(4) of the Charter is seemingly clear in its mandate:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.⁶¹

The notion of what constitutes a use of force has not been clearly established either by state practice or by scholars; however, several things are clear. First, the notion of what force is under Article 2(4) certainly includes all uses of armed force as well as

⁵⁹ Under Article 38 of the Statute for the International Court of Justice, the sources of international law are found in international agreements, international custom, and general principles of law, with subsidiary determination of the law being garnered through judicial decisions and the teachings of the world's most highly qualified publicists. *Statute of the International Court of Justice*, 59 Stat. 1055.

⁶⁰ "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." Charter of the United Nations, 26 June 1945, Can. T.S. 1945 No. 7 at art 103 [UN Charter].

⁶¹ *Ibid.* at art. 2(4).

other types of physical force that might typically be used against civil aircraft in flight.⁶² Additionally, while States are the primary focus on the article's prohibitions, a State may be held accountable for the acts of others in certain circumstances. For example, a State may be guilty of an unlawful use of force if it is in control of armed bands or terrorists sent across borders to use armed or physical force in another State, including engaging in the shootdown of civil aircraft.⁶³ Also, while the words "territorial integrity" and "political independence" seem to place some limitation on the scope or intensity of a use of force before it would violate Article 2(4), such is not the case. There is strong support for the proposition that it includes *any* cross-frontier military action, regardless of scope or purpose.⁶⁴ This almost certainly includes not only actions in other States, but also actions conducted in places beyond the sovereign control of any State, such as the high seas, outer space, and Antarctica.

Any analysis of conduct potentially in violation of Article 2(4) is full of pitfalls. There are few other provisions of international law with such political implications as Article 2(4) and certainly few others with such ambiguous meaning in its key provisions.⁶⁵ A full scale analysis of what is and is not a use of force has been the subject of scores of works of international law. While an in-depth analysis of Article 2(4) is far beyond the scope of this work, it is useful to examine how this provision of international law can potentially impact operations involving the shootdown of civil aircraft, including those conducted under ABDP operations.

⁶² See Bruno Simma, ed., *The Charter of the United Nations: A Commentary*, (Oxford: Oxford University Press 1994) at 112-113 [Simma, *UN Charter*].

⁶³ See *ibid.* at 115.

⁶⁴ See *ibid.* at 117-118.

⁶⁵ As one author has stated: "The prohibition on the use of force ... is burdened with uncertainties resulting from the, undoubtedly ambiguous, wording of the relevant provisions of the UN Charter, as well as from their unclear relations to one another. These ambiguities leave room for individual states to interpret the Charter provisions in accordance with their particular political interests." *Ibid.* at 127-8.

2. The Shootdown of Civil Aircraft as a Use of Force

Many potential shootdown scenarios do not implicate the rules on the use of force under the Charter, as they do not involve cross-border activity. The notion that a State may be guilty of an unlawful use of force through actions conducted in its own territory has been subject to considerable doubt in international law.⁶⁶ The issue was before the International Court of Justice (ICJ), but the court refused to consider the question of whether a use of force could occur on a State's own territory.⁶⁷ We shall therefore proceed under the understanding that a use of force has some measure of extraterritoriality that is not applicable to a State's actions in areas under its sovereign control.

In the BTTR case, the one case where a shootdown occurred over international waters, Article 2(4) was not invoked by the international community as a basis for criticizing Cuba. However, evidence suggests that the use of weapons against a foreign civil aircraft in international airspace is a use of force and must therefore be justified under the rules of the UN Charter. After the 1996 BTTR shootdown, President Clinton is reported to have considered a missile attack on Cuban MiG-29 bases in response.⁶⁸ Since there was no Chapter VII authorization from the Security Council, President Clinton

⁶⁶ See David K. Linnan, "Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility" (1991) 16 *Yale J. Int'l L.* 245 at 387 [Linnan, "Iran Air Flight 655"].

⁶⁷ See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Reports 226, para. 50. [*Nuclear Weapons Case*]. In his in-depth analysis of every use of force from 1945-1991, Professor Mark Weisburd does not include any civil aircraft shootdowns as "uses of force." He does however, include two lesser operations against civil aircraft. He classifies both the 1985 interception over the high seas of an Egypt Air 737 by U.S. fighters as a use of force. He also classifies a similar operation by the Israeli Air Force over the high seas as a use of force. This implies that even an action against civil aviation that does not result in a shootdown can be a use of force if it is done outside sovereign territory. Conversely, a shootdown done inside an area of sovereign control is not a use of force under Article 2(4). See A. Mark Weisburd, *Use of Force: The Practice of States Since World War II* (University Park, Pennsylvania: The Pennsylvania State University Press, 1997) at 291-93.

⁶⁸ See Andres Oppenheimer "Missile Attack Weighed After Shootdown" *Miami Herald* (10 October 1996) 25A.

would have been acting under the inherent right to self-defense. This necessarily implies that the U.S., in the BTTR incident, was the victim of an armed attack, an aggravated form of force and a violation of Article 2(4). It can therefore be said that any planned shootdown operation outside the area of sovereign control of a State is subject to the limits of the UN Charter and may not be targeted at civil aircraft unless the strict requirements of Article 51 are met, or the operation is conducted under a Chapter VII authorization from the UN Security Council.

At present, ABDP programs are conducted by States inside their own territorial airspace. As such, there is no implication of Article 2(4). Additionally, if there were an international agreement among participating States to conduct cross-border operations, this too would not precipitate an Article 2(4) violation amongst its participants, as the potential victim would have consented to the operation. However, should there be any plans to conduct shootdown operations non-consensually over another sovereign State, such an action would be a use of force and a violation of Article 2(4). Professor Schmitt has agreed, in theory, stating that a no-fly zone conducted without the consent of the subjacent State would be a use of force.⁶⁹

⁶⁹ See Michael N. Schmitt, "Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement" (1998) 20 *Loy. L.A. Int'l & Comp. L.J.* 727 at 743. There is one interesting situation in which such a non-consensual shootdown could take place. Recall that in 2002, the CIA used a hellfire missile launched from a Predator Unmanned Aerial Vehicle (UAV) operating over Yemen to kill 6 suspected terrorists riding in a car. See Norman G. Printer, Jr., "The Use of Force Against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen" (2003) 8 *U.C.L.A. J. Int'l & For. Aff.* 331 at 335-36 [Printer, "Predator Strike in Yemen"]. This raises the question as to when the situation will arise when a military or intelligence arm of a government will decide to target a terrorist who is being transported in a civil aircraft. Could such an aircraft be shot down? Foreign assassination has been seen as a violation of Article 2(4). See Louis Rene Beres, "The Newly Expanded American Doctrine of Preemption: Can it Include Assassination?" (2002) 31 *Denv. J. Int'l L. & Pol'y* 157 at 160. In response to the U.S. Predator strike in Yemen, the Swedish Foreign Minister said if the U.S. did it without Yemeni permission, then it was an unlawful use of force. See Heinz Klug, "Civil Liberties in a Time of Terror: The Rule of Law, War, or Terror" (2003) 2003 *Wis. L. Rev.* 365 at 380 [Klug, "Civil Liberties"]. There is no reason to believe that the same would not be true if the operation had been targeted at a terrorist in an aircraft versus one riding in a vehicle on the ground. It should be noted that these types of targeted killings have been justified under

Such non-consensual shootdown operations against hostile targets may be on the horizon. The U.S. military is currently working to fit Predator UAVs with sidewinder missiles, possibly designed for this very purpose.⁷⁰ Such a broadening of ABDP operations could take place in a situation in which a country fails to take adequate steps to stop the flow of illegal drugs from inside its borders, leading to the implementation of non-consensual shootdown operations over that State's territory. While the rules on the use of force do not directly impact current ABDP operations, they do certainly lay down rules regarding where such operations can lawfully be conducted. The shootdown of civil aircraft, including shootdowns conducted under ABDP, may not extend beyond the area of sovereign control of a State without implicating the UN Charter norms regulating the use of force.

B. Public International Air Law

While the UN Charter contains rules governing State behavior that will necessarily govern *any* operation involving the use of force among nations, the next area of law is more specific. Public international air law is a subset of international law dealing with international aviation. It covers a wide range of topics, only a small slice of which is relevant here.

1. The Chicago Convention of 1944

Even as the Second World War raged in both Europe and the Pacific, Allied and neutral States had an eye on the post-war international framework, including the framework for civil aviation. These nations met in Chicago in 1944, the result of which

international law under self-defense. While the question of whether such operations are legal under a self-defense argument is beyond the scope of this work, if such operations are indeed justified under self-defense, then they could necessarily be conducted against civil aircraft, so long as the requirements of self-defense, necessity, and proportionality are met.

⁷⁰ See U.S., Congressional Research Service, *Homeland Security: Defending U.S. Airspace* (2003) at 6.

was the Convention on International Civil Aviation, commonly known as the Chicago Convention.⁷¹ The Chicago Convention serves both as a convention regulating international civil aviation and as a constitution for an international organization, the International Civil Aviation Organization (ICAO). The scope of the Chicago Convention is broad, covering everything from flyover rights to the licensing of flight crew to the registration of aircraft.

Under the penumbra of this convention are three major provisions that relate to the shootdown of civil aircraft: Article 3d, Annex 2 and Article 3bis. While one would expect these provisions to be universally applicable among parties to the convention⁷² and to have relatively clear meanings, neither is absolutely true. In fact, Bin Cheng, in the wake of the KAL 007 shootdown, noted that “while there is no question that international law has been violated, what one may wonder is the precise configuration of the rule which the Soviet Union is condemned for having violated in this instance.”⁷³ Nonetheless, an examination of these provisions is important in a review of the normative structure of this area of law.

a. Article 3d

Any rule regulating or prohibiting the use of force against civil aircraft in flight would necessarily undertake to regulate the utilization of military aircraft, as well as possibly even police and customs aircraft. Yet, by its own terms, the Chicago Convention is not applicable to state aircraft.⁷⁴ The Convention states that “[a]ircraft

⁷¹ *Chicago Convention on International Civil Aviation*, 7 December 1944, 15 U.N.T.S. 295, 61 Stat. 1180 [Chicago Convention].

⁷² The Chicago Convention has 188 State parties out of 191 UN members.

⁷³ Bin Cheng, “The Destruction of KAL Flight KE007, and Article 3bis of the Chicago Convention” in J.W.E. Storm van’s Gravesande and A. van der Veen Vonk, eds., *Air Worthy* (Deventer: Kluwer, 1985) at 58 [Cheng, “Article 3bis”].

⁷⁴ *Supra* note 71 at art. 3(a).

used in military, customs and police services shall be deemed to be state aircraft.”⁷⁵ By implication, all other aircraft are deemed to be civil aircraft.⁷⁶

Despite its self-imposed inapplicability to state aircraft, the Convention contains two provisions that purport to apply to state aircraft. First, States are forbidden to fly state aircraft over the territory of another State without permission.⁷⁷ The second requirement for state aircraft is contained in Article 3(d), which requires that parties “undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.”⁷⁸

While the original text of the Chicago Convention does not address the use of force against aircraft, the ICAO Council has recognized that a shootdown event can be contrary to the provisions of the Convention, implying that the relevant provision is Article 3(d).⁷⁹ In fact, Article 3(d) has been described as the “principle treaty obligation imposed upon States for the regulation of the flight of military aircraft applicable during times of peace and armed conflict found in the Chicago Convention.”⁸⁰

The requirements of Article 3(d) are quite general in scope. It certainly obligates States to set up some type of regulatory regime for state aircraft. What this means specifically is subject to debate. One view, and probably the best, is that the “word ‘regulation’ is subject to a broad interpretation in order to include military orders,

⁷⁵ *Ibid.* at art. 3(b).

⁷⁶ There is argument to the contrary. It has been put forth that other government aircraft, such as those engaging in medical service operations, mapping and survey services, VIP transport, disaster relief, and mail services are also state aircraft. Michel Bourbonniere and Louis Haeck “Military Aircraft and International Law: Chicago Opus 3” (2001) 66 J. Air L. & Comm 885 at 897 [Bourbonniere & Haeck, “Military Aircraft”]. But see ICAO, *Secretariat Study on ‘Civil/State Aircraft’* LC/29-WP/2-1, at attach. 1.

⁷⁷ See *Chicago Convention*, *supra* note 71 at art. 3(c).

⁷⁸ *Ibid.* at art. 3(d).

⁷⁹ ICAO, *Council Resolution Concerning Israeli Attack on Libyan Civil Aircraft*, 12 I.L.M. 1180 (1973) [ICAO Resolution on Libyan Shootdown]. In this resolution the Council implied that the Israeli attack did indeed violate the Chicago Convention. Such an understanding was also implied by the U.S. in internal Department of State communications. See *February 1994 Bogotá Cable*, *supra* note 13 at 3.

⁸⁰ Bourbonniere & Haeck, “Military Aircraft”, *supra* note 76 at 913.

including rules of engagement given by military hierarchy to its pilots and air traffic controllers.”⁸¹ Both the United States and Canada have taken such a position in the past.⁸²

In fact, the United States has gone even further, taking the position that Article 3(d) prohibits the shootdown of civil aircraft, even in the setting of ABDP-style shootdowns.⁸³ During the 1994 debate over the shootdown component of the ABDP, the State Department noted that after the KAL 007 shootdown, the U.S. “argued vigorously after the Soviet downing of KAL 007 that such actions violate Article 3(d) of the 1944 Convention on International Civil Aviation”⁸⁴

The generalities of Article 3(d) should not operate to render void its applicability to the shootdown of civil aircraft. The requirement to refrain from shooting down civil aircraft is properly within its general mandate and is binding upon signatories, unless some provision of international law excuses the State from such an obligation. After an examination of Article 3*bis* and Annex 2, the importance of Article 3(d) will be apparent, as it is the only universally binding provision contained in the original Chicago Convention.

b. Annex 2

The International Civil Aviation Organization has a power that few international organizations have, quasi-legislative power. The Chicago Convention mandates that ICAO adopt standards and recommended practices (SaRPs) on a whole host of matters

⁸¹ *Ibid.* at 926-27.

⁸² See *ibid.* at 927.

⁸³ See *October 1989 Position Paper*, *supra* note 13. After the shootdowns started, the U.S. again called such actions a violation of Article 3(d). See *June 1994 Memo to Secretary of State*, *supra* note 58 at 2.

⁸⁴ *May 1994 Shootdown Memo to U.S. Secretary of State*, *supra* note 16 at 1.

relating to international civil aviation.⁸⁵ These SaRPs are contained in annexes to the Convention that may be amended by the ICAO Council with a 2/3 vote.⁸⁶ While recommended practices are of no binding effect, standards are binding on all State parties, unless they file a difference with ICAO.⁸⁷ But even then, the differences are of limited effect. A State can only promulgate rules in areas over its own sovereign control, and ICAO rules are in force over the high seas.⁸⁸

Every interception of an aircraft by fighter jets is potentially dangerous, even in the most routine situation. As such, ICAO has promulgated rules in Annex 2, entitled “Rules of the Air,” which deal with the rules to be followed when undertaking to intercept a civil aircraft, and to which ICAO Interception Procedures refer.⁸⁹ Annex 2 had previously contained a provision calling on States to refrain from the use of weapons against civil aircraft, but that provision was removed in 1984. It was believed that, since this prohibition was already a part of general international law, it had no place in an annex from which States could deviate from compliance under Article 38 by filing a difference with ICAO.⁹⁰ Nevertheless, Annex 2 contains important rules relevant to issues surrounding the shootdown of civil aircraft.

Annex 2 provides that interceptions must be undertaken as a last resort, and when undertaken, their purpose must be solely to identify the suspect aircraft.⁹¹ It provides for a three phased approach for the identification:

⁸⁵ *Chicago Convention*, *supra* note 71 at art. 37.

⁸⁶ *Ibid.* at art. 90.

⁸⁷ *Ibid.* at art. 38.

⁸⁸ *Ibid.* at art. 12.

⁸⁹ *Ibid.* at annex 2, app. 2, attach. A

⁹⁰ See Michael Milde, “Interception of Civil Aircraft vs. Misuse of Civil Aviation” (1986) 11 *Annals of Air and Space Law* 105 at 113 [Milde, “Interception of Civil Aircraft”].

⁹¹ *Chicago Convention*, *supra* note 71 at annex 2, attach. A, para. 2.1. The implication here is that an interception may not be undertaken for the purpose of engaging in a shootdown operation.

Phase I - The intercepting aircraft takes up position on the port side of the intercepted aircraft, above and ahead of the aircraft in view of the pilot and no less than 300 meters away. All other intercepting aircraft are to stay clear.

Phase II - The intercepting aircraft closes gently with the intercepted aircraft without startling the crew.

Phase III - The intercepting aircraft breaks contact in a shallow dive.⁹²

Communication is standardized for those aircraft undertaking interceptions, with phrases for oral communication⁹³ and signals for visual communication provided.⁹⁴ While the use of weapons is not addressed, there is a requirement regarding the use of tracer bullets. "The use of tracer bullets to attract attention is hazardous, and it is expected that measures will be taken to avoid their use"⁹⁵

Since the 2nd edition of Annex 2, there have been no recommended practices, only standards requiring notice from States that refuse to comply. Most of the major provisions relating to the interception of civil aircraft contained in Annex 2 came in 1984 in the form of Amendment 27. These amendments were in the wake of KAL 007 and made the rules on interceptions more specific. Both the U.S. and the U.S.S.R. believed that the amendments were *ultra vires*, in that the amendments unduly attempted to regulate state aircraft in violation of the Chicago Convention. However, the majority of States did not believe that the amendments regulated state aircraft, but rather were designed to protect international civil aviation, well within the ambit of the Chicago Convention.⁹⁶ The U.S. never registered a difference regarding Amendment 27, mainly

⁹² *Ibid.* at para 3.

⁹³ See *ibid.* at table A-1

⁹⁴ See *ibid.* at annex 2, app. 1.

⁹⁵ *Ibid.* at attach. A, para. 8.

⁹⁶ See Ki-Gab Park, *La Protection de La Souveraineté Aérienne* (Revue Générale de Droit International Public: Nouvelle Série N. 44, 1991) at 306 [Park, *Souveraineté Aérienne*].

because it does not accept that any part of Annex 2 applies to the operation of state aircraft.⁹⁷ This is in direct conflict with the rules that govern the high seas, as in conformity with Article 12, Annex 2 states that “[o]ver the high seas ... these rules [Annex 2] apply without exception.”⁹⁸ Also, Annex 2 is only applicable to the interception of aircraft. Some countries do not have interception capabilities and are reliant solely on anti-aircraft artillery (AAA) forces for anti-aircraft capability. Annex 2 would not apply to AAA operations. Thus, while its provisions are important, the legal effect of Annex 2 is not without limitations.

c. Article 3bis

On September 1, 1983, Soviet MiG fighters shot down KAL 007 off the coast of Sakhalin Island, after the aircraft strayed over Soviet territory *en route* to Seoul, South Korea from New York, *via* Anchorage, Alaska. Soon after the incident, work began to create a protocol to the Chicago Convention that would codify rules regarding the use of weapons against civil aircraft in flight. What resulted was the Montreal Protocol of 10 May 1984, which amended Article 3 of the Convention and became known as Article 3bis.⁹⁹

Article 3bis of the Chicago Convention governs the issue of the use of weapons against civil aircraft:

The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the

⁹⁷ See Milde, “Interception of Civil Aircraft”, *supra* note 90 at 121.

⁹⁸ *Chicago Convention*, *supra* note 71 at annex 2.

⁹⁹ *Amendment of Convention on International Civil Aviation with Regard to Interception of Civil Aircraft*, (May 10, 1984), ICAO Doc. 9437, A25-Res., reprinted in 23 I.L.M. 705 (1984) [Article 3bis].

The requirement that States refrain from the use of weapons against aircraft in flight is balanced by measures designed to protect the sovereignty of the subjacent State.

[E]very State ... is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations.... Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.¹⁰¹

Additionally, Article 3*bis* mandates that States take steps to prohibit the misuse of civil aviation.

Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention.¹⁰²

While it was adopted unanimously at the Twenty-fifth Session (Extraordinary) of the ICAO Assembly, the amendment lingered without receiving the required number of ratifications to come into force for 14 years. Article 3*bis* finally came into force for State parties on 1 October 1998, with the ratifications of Guinea and, ironically, Cuba.¹⁰³

The actual legal effect resulting from the coming into force of Article 3*bis* may be less important than for most treaties, as the use of the words "contracting States recognize that every State must refrain from the resort to weapons against civil aircraft" in paragraph (a) of the amendment seems to indicate that this amendment is a codification of existing customary international law already binding on all States. In fact, it has been pointed out that "no delegation [at the Extraordinary ICAO Assembly in 1984]

¹⁰⁰ *Ibid.* at art. (a).

¹⁰¹ *Ibid.* at art. (b).

¹⁰² *Ibid.* at art. (d).

¹⁰³ See "Shootdown Law Ratified" (1998) 149 *Air Transport* 33.

challenged the fact that the prohibition of use of force against civil aircraft is already part of general international law.”¹⁰⁴ Many imminent scholars, including Professor Michael Milde, the head of the ICAO Legal Bureau at the time, believe that it is indeed reflective of customary international law.¹⁰⁵ However, such a belief is not universal.¹⁰⁶

It seems clear that Article 3*bis* covers all international civil aviation, regardless of the type of airframe and regardless of whether the aircraft is engaged in service as a commercial airliner; however, different views have also been taken. The Government of Columbia took the position that Article 3*bis* covered only “commercial airliners” and other aircraft with legitimate flight plans.¹⁰⁷ Such an interpretation would render many general aviation flights that might stray across international boundaries unprotected by international law. Subsequent state practice has assisted in the determination of the scope of Article 3*bis* even before it came into force.¹⁰⁸ After the Cuban shootdown of the BTTR flights in 1996, there were numerous condemnations, many invoking the prohibition as codified in Article 3*bis*. This certainly leads one to believe that the scope of the article is broad rather than narrow and includes all international civil aviation, including some civil aviation flights potentially subject to targeting under the ABDP.

There is also a question about the protection afforded to domestic civil aviation under Article 3*bis*. While the amendment does not make a distinction between foreign

¹⁰⁴ “International Organizations: 25th Session (Extraordinary) of the ICAO Assembly” (1984) 9 *Annals of Air and Space L.* 455 at 457.

¹⁰⁵ See Milde, “Interception of Civil Aircraft” *supra* note 90 at 125.

¹⁰⁶ See Cheng, “Article 3*bis*”, *supra* note 73 at 59-61.

¹⁰⁷ See *February 1994 Bogotá Cable*, *supra* note 13 at 5. In a later press release announcing their plans to implement a shootdown policy, the Colombian Government stated that it would never use force against “regular commercial airliners whose purpose is to transport passengers,” as the protections of the Chicago Convention and Article 3*bis* were designed for their protection. *Translation of March 94 Colombian Press Conference*, *supra* note 17 at 3.

¹⁰⁸ See *Vienna Convention on the Law of Treaties* (23 May 1969) 1155 U.N.T.S. 331 (entered into force 27 January 1980), at art 31(3)(b) [*Vienna Convention*].

and domestic civil aircraft, the prevailing view is that protection afforded by Article 3bis is for foreign aircraft, not aircraft of a State's own registration.¹⁰⁹ Such an interpretation would be *ultra vires* and would exceed the scope of the Chicago Convention, the focus of which is international civil aviation.¹¹⁰ This view is supported by the negotiating history of Article 3bis.¹¹¹ The proposed words "aircraft of the other contracting State" were deleted to show that the obligation was not to other signatories of Article 3bis but to all States, not to aircraft of a State's own registration.¹¹² One author takes it a step farther, stating that Article 3bis does not apply if those on board are nationals of the State shooting at the aircraft, if the aircraft are not registered in another State, or if the flights do not cross international boundaries.¹¹³ However, this view may be stretched, as Article 3bis does not seem concerned with the nationality of those on board, only with the State of registration of the aircraft.

The critics of Article 3bis are many. Some have called it an attempt to "codify the almost uncodifiable,"¹¹⁴ others have said it "had something for everyone and resolved nothing."¹¹⁵ These criticisms are understandable, but one has to take into account the delicate political nature of the protocol's formation, with the Cold War as its backdrop. Seen in that light, the amendment is an honest attempt to put an end to the shootdowns

¹⁰⁹ Milde, "Interception of Civil Aircraft", *supra* note 90 at 126.

¹¹⁰ "At no stage to the deliberations and drafting did the Assembly . . . contemplate regulation of the status of an aircraft in relation to the state of its own registration, as this would have exceeded the scope of the Convention, which limits it to international civil aviation." Ruwantissa Abeyratne, "Crisis Management Toward Restoring Confidence in Air Transport – Legal and Commercial Issues" (2002) *J. Air L. & Comm* 595 at 616.

¹¹¹ See Phillip A. Johnson, "Shooting Down Drug Traffickers" in Michael N. Schmitt, ed., *The Law of Military Operations – Liber Amicorum Professor Jack Grunawalt*, (Newport: Naval War College, 1998) 79 at 90 [Johnson, "Shooting Down Drug Traffickers"].

¹¹² See Cheng, "Article 3bis", *supra* note 73 at 63.

¹¹³ See Johnson, "Shooting Down Drug Traffickers", *supra* note 111 at 90.

¹¹⁴ Peter Ateh-Afac Fossungbo, "The ICAO Assembly: The Most Unsupreme of Supreme Organs in the United Nations System? A Critical Analysis of Assembly Sessions" (1998), 26 *Trans L.J.* 1 at 22.

¹¹⁵ R. W. Johnson, *Shootdown: The Verdict on KAL 007* (London : Chatto & Windus, 1986) at 237.

that were an all too common part of the Cold War.

Another criticism, leveled very early but seemingly more true today, came from Professor Bin Cheng. He says that the amendment “betrays its historical origin and appears excessively obsessed with the ... [KAL 007] incident to the disregard of many other relevant factors.”¹¹⁶ It is indeed true that the focus of Article 3*bis*, at least from a Western view, is on the use of weapons against civil aircraft as a response to a trespass. The Soviet Bloc was more concerned with the misuse of civil aviation, the remedy for which found in Article 3*bis* is to allow States to require the landing of suspect aircraft; however, Article 3*bis* lacks provisions regarding what a State can do when a suspect aircraft refuses to comply with instructions, thus prompting the question, how does a State “play by the rules and yet deal effectively with someone who does not?”¹¹⁷ Although that question was asked about terrorists, it is equally applicable to the drug traffickers in South America and to other non-State misuses of civil aviation. Therein is contained the fundamental weakness of Article 3*bis*: the lack of practical enforcement measures to be employed when a suspect aircraft refuses to land.

One author has noted that the “events of September 11th, 2001 will almost certainly have a significant impact on whether the amendment will ever be ratified by the United States.”¹¹⁸ That is true, for a second reason that Article 3*bis* is flawed is its location. It is not a stand-alone treaty but is rather part of the Chicago Convention, thereby falling under the Chicago Convention’s dispute resolution procedures. Under the Convention, disputes relating to issues under the Convention or its annexes will be

¹¹⁶ Cheng, “Article 3*bis*”, *supra* note 73 at 68.

¹¹⁷ Gregory M. Travalio, “Terrorism, International Law, and the Use of Military Force” (2000) 18 Wis. Int’l L.J. 145.

¹¹⁸ Stephen M. Shewsbury, “September 11th and the Single European Sky: Developing Concepts of Airspace Sovereignty” (2003) 68 J. Air L. & Comm. 115 at 141 [Shewsbury, “Single European Sky”].

decided by the ICAO Council with an appeal to the International Court of Justice.¹¹⁹ It is less and less likely after 9/11 that States, especially the U.S., will be willing to have their judgment on when and when not to shoot down a civil aircraft second-guessed by a quasi-judicial body or the ICJ. And there is very little incentive to do so, as simply taking the position that Article 3*bis* is reflective of customary international law provides all of the protection to a State's civil aircraft, without having the risk of facing a tribunal to justify a shootdown.

2. Customary International Law

States are not only bound by international agreements that they sign and ratify, but also by norms that are developed through state practice. Customary international law can exist alongside identical norms contained in treaty law.

[E]ven if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence.¹²⁰

When attempting to ascertain customary international law, one looks to the actual practice of States and to what degree that practice reflects *opinio juris*, a sense of legal obligation versus mere comity.¹²¹

a. Past Shootdowns of Civil Aircraft

Past shootdowns of civil aircraft have been discussed in great detail in other works.¹²² It is useful, however, to review the major historical events involving the shootdown of civil aircraft since World War II in order to get a view of the general state

¹¹⁹ See *Chicago Convention*, *supra* note 71 at arts. 84 & 85.

¹²⁰ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (Nicaragua V. U.S.) Merits, [1986] I.C.J. Rep. 14 para. 178 [*Nicaragua Case*].

¹²¹ See *Nuclear Weapons Case*, *supra* note 67 at para 64.

¹²² See Bernard E. Donahue, "Attacks on Foreign Civil Aircraft Trespassing in National Airspace" (1989) 30 A.F. L. Rev. 49 at 54-63 [Donahue, "Attacks on Foreign Civil Aircraft"].

practice as it relates to these events and the *opinio juris* contained in pronouncements relating to these events. The reaction of States to these shootdowns is telling, and some useful rules can be deduced from these events and from the reactions following them that are helpful to serve as gap-fillers where treaty law is inapplicable.

Attack on an Air France Airliner in the Berlin Corridor – 29 April 1952

On 29 April 1952, an Air France airliner is alleged to have deviated from its designated route through the Berlin Corridor, straying over East German Territory. In response, Soviet MiG-15 fighters attacked the aircraft with cannon and machine gun fire. The attack, though it did not result in a total loss of passengers and crew as is the case in other situations, did nonetheless lead to several injuries.¹²³ While it was not an actual shootdown, this event proved to be the first in a series of Cold War attacks on civil airliners, and state reaction is useful in ascertaining the first hint of developing international norms regarding the use of force against civil aircraft.

The response from the West was predictably negative. The French, joined by the Americans and the British, stated that, regardless of where the aircraft was located, any use of weapons, even to warn a stray aircraft, was “entirely inadmissible and contrary to all standards of civilized behavior.”¹²⁴ In their defense, the Soviets stated that they were responding to a border incursion and had made attempts to warn the aircraft and order it to land.¹²⁵ They further bolstered their claims of innocence by saying that the shots were only meant to be warning shots.¹²⁶

¹²³ See John T. Phelps, “Aerial Intrusions by Civil and Military Aircraft in Time of Peace” (1985) 107 Mil. L. Rev. 255 at 276-77 [Phelps, “Aerial intrusions”].

¹²⁴ Oliver J. Lissitzyn, “The Treatment of Aerial Intruders in Recent Practice and International Law” (1953) 47 Am. J. Int’l L. 559 at 574.

¹²⁵ See Phelps, “Aerial intrusions”, *supra* note 123 at 277.

¹²⁶ See Farooq Hassan “A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union” (1984) 49 J. Air L. & Comm. 555 at 571 [Hassan, “KAL 007”].

The reaction by the Allies confirms their belief that it was not lawful under international law to use force against a civil aircraft in such a situation. What is even more interesting is the Soviet reaction. They never asserted a right to shootdown an aircraft in response to a mere trespass. In fact, their response sounds more like "it was an accident" than an attempt to put forth a legal justification for the shootdown.

Cathay Pacific Shootdown by PRC Forces Near Hainan Island – 23 July 1954

In this incident, forces from the People's Republic of China shot down a British registered Cathay Pacific airliner, *en route* from Bangkok to Hong Kong, in the vicinity of Hainan Island. The aircraft was not large, carrying only 12 passengers and 6 crew. The attack by PRC forces came without warning and forced the small airliner to crash in the sea, resulting in 10 deaths.¹²⁷

The attack was described by the U.S. as "barbarity" and was condemned by both the U.S. and the British Governments.¹²⁸ It came at a time of increased military tension between the PRC and the Nationalist Chinese, immediately preceding the Taiwan Straits Crisis and the PRC attacks on the islands of Quemoy and Matsu. The Chinese formally apologized for the incident and offered to pay compensation, calling it an unfortunate accident. The Chinese stated that the Cathay Pacific airliner had been mistaken for Nationalist Forces and was therefore shot down. It appears that the Chinese believed the aircraft was a Nationalist Chinese aircraft *en route* to an attack against a Chinese naval base on Hainan Island.¹²⁹

The reaction to this case is quite similar to the Air France incident. The West cried out against the action, and the perpetrator claimed a mistake. What makes this case

¹²⁷ See Geiser, "Fog of Peace", *supra* note 19 at 193-94.

¹²⁸ See *ibid.* at 194.

¹²⁹ See Phelps, "Aerial intrusions", *supra* note 123 at 278.

even stronger evidence of the international norm prohibiting the use of force against civil airliners in flight is the formal apology offered by the Chinese, at a time shortly after the Korean War and during a time of tension with the U.S. and U.K. While they could have easily used Cold War rhetoric to justify the shootdown, they chose not to do so. This speaks volumes about the binding nature of the prohibition contained in customary international law.

El-Al Constellation Shootdown over Bulgaria – 27 July 1955

While both the attack on the Air France aircraft over Berlin and the Cathay Pacific aircraft near Hainan Island prompted international rebuke, the gravity and scale of these two incidents would pale in comparison to the next shootdown the following year. On 27 July 1955, an Israeli-registered El-Al Constellation carrying 51 passengers and 7 crew members *en route* from London to Tel Aviv strayed over Bulgarian airspace and was shot down by Bulgarian interceptors. Everyone aboard was killed.¹³⁰

The attack came with no warning to the crew and without any attempt to force the landing of the intruder before Bulgaria shot the aircraft down.¹³¹ Condemnation was swift, with Israel, the U.S., and the U.K. as the strongest critics. Israel said that the Chicago Convention codified general international law and that simple defense of airspace was never enough to justify the destruction of a civilian aircraft.¹³² The United Kingdom stated that it was unacceptable for any State to shootdown a civil aircraft in peacetime.¹³³ The French joined in, going so as to call the shootdown an act of war.¹³⁴

¹³⁰ See Donahue, "Attacks on Foreign Civil Aircraft", *supra* note 122 at 54; Phelps, "Aerial intrusions", *supra* note 123 at 279.

¹³¹ See Donahue, "Attacks on Foreign Civil Aircraft", *supra* note 122 at 55.

¹³² See *ibid.* at 56-57.

¹³³ See Geiser, "Fog of Peace", *supra* note 19 at 194-95.

¹³⁴ See *ibid.* at 195.

Deception by the Bulgarians soon followed. Bulgaria initially said the aircraft was shot down by AAA after efforts to identify it failed. Later, after Israeli authorities had a chance to examine the wreckage and challenged the Bulgarian assertion, Bulgaria admitted that the aircraft had been shot down by its interceptors and not by AAA.¹³⁵ In a very contrite note to the United States, Bulgaria expressed regret for the incident, promised to punish the pilots, and offered compensation for the deaths and material damage.¹³⁶

Such regret was short-lived, as Bulgaria later denied responsibility for the incident and offered only *ex gratia* payments. They eventually made a complete reversal, laying the blame squarely on the El-Al crew.¹³⁷ Dissatisfied with the Bulgarian actions, the United States, the U.K., and Israel filed suit in the ICJ. Bulgaria refused to submit to the jurisdiction of the court, and the case was never heard.

Again the West and its allies supported the proposition that the use of weapons against civil aircraft in flight was contrary to international law. The first Bulgarian reaction is important, as it was an initial reaction to a tragedy before Cold War politics entered into the mix. Their initial story that the plane was shot down by AAA was clearly an attempt to deny that they had knowledge that the aircraft was a civil aircraft. After being confronted with the lie, they admitted the truth and offered compensation for the violation of international law. Only when Cold War realities set in did their reaction change.

Israeli Shootdown of a Libyan Airlines 727 over the Sinai Peninsula – 21 February 1973

The victim in the previous case was later to become the accused. Israeli fighters

¹³⁵ See Phelps, "Aerial intrusions", *supra* note 123 at 279.

¹³⁶ See Donahue, "Attacks on Foreign Civil Aircraft", *supra* note 122 at 55.

¹³⁷ See *ibid.* at 56.

intercepted a suspicious Boeing 727 airliner with the markings of the Libyan national airline over the Israeli-occupied Sinai Peninsula. After attempts to get the airliner to land failed, the judgment was made that the aircraft was hostile and had to be shot down. Israeli warplanes fired at the airline; it crashed, resulting in the death of 106 persons. The judgment that the aircraft was hostile had been incorrect. It was merely an off-course commercial aircraft.

Various factors played into the erroneous decision to fire. The aircraft was flying near the Dimona Research Facility and an Israeli nuclear separation plant, two extremely critical national security facilities.¹³⁸ The aircraft was also near Israeli troop concentrations, and the Israelis had intelligence of possible suicide attacks using civil aircraft.¹³⁹ An Israeli General is quoted as saying that the aircraft was fired upon because it acted like a hostile plane.¹⁴⁰

International reaction was overwhelmingly negative. Israel itself stated that had it known it was indeed a passenger jet, it would not have shot it down.¹⁴¹ In a most general statement, the ICAO Council concluded that the shootdown violated the "principles enshrined in the Chicago Convention."¹⁴²

While the aircraft had intruded over Israeli-occupied territory, this case is not an "intrusion shootdown." The aircraft was targeted because it was seen as a threat. What is critical here is the quantum of evidence ascertained by Israel in making the judgment that the aircraft was hostile. International Law will clearly excuse the shootdown of an

¹³⁸ See Jacob Sundberg, "Legitimate Responses to Aerial Intruders: The View from a Neutral State" (1985) 10 *Annals of Air & Space Law* 258 at 267 [Sundberg, "Legitimate Responses to Aerial Intruders"].

¹³⁹ See Donahue, "Attacks on Foreign Civil Aircraft", *supra* note 122 at 59.

¹⁴⁰ See Sundberg, "Legitimate Responses to Aerial Intruders", *supra* note 138 at 267.

¹⁴¹ See Donahue, "Attacks on Foreign Civil Aircraft", *supra* note 122 at 59.

¹⁴² See *ICAO Resolution on Libyan Shootdown*, *supra* note 79.

airliner being used in a suicide attack as the Israelis suspected, but the criterion used in this case to make the determination was insufficient. At the very least, the Israelis acted in haste before confirming anecdotal data.

Korean Airlines Flight 902 Shootdown over the USSR – 20 April 1978

In a nearly forgotten incident of the Cold War, Korean Airlines flight 902, a Boeing 707, was fired upon by a Soviet MiG after it strayed over the USSR near the Kola Peninsula while flying a polar route. The aircraft descended rapidly after losing pressure and nearly half of a wing in the missile attack, and Soviet authorities believed it had crashed. The plane flew on for about an hour looking for a landing spot before the captain put the aircraft down on the frozen ice of Korpijärvi Lake. Amazingly, only two persons were killed.

There was little diplomatic outcry, primarily because absent protests from the U.S. and ROK, others were unwilling to protest themselves.¹⁴³ One can speculate that the silence of the ROK and its primary Cold War Ally, the U.S., was perhaps due to the low casualty figure or to a desire on the part of the Koreans to retrieve their flight crew from Soviet custody. Whatever the reason, the Soviets were quite strong in their justification, asserting the right to defend their airspace against any intruders. However, evidence suggests that the Soviets did not intend to shoot down a civil aircraft and had no “shoot on sight” rules for intruding civil aircraft.

When the Soviet pilot was ordered to destroy KAL 902, he protested telling his controller that he could clearly see the civil markings. When the ground controllers repeated the order, the pilot again questioned the order. At this point a Soviet general identified himself to the pilot and ordered him to destroy KAL 902. Only then did the pilot fire at the aircraft. An American intelligence officer who was listening to the conversation later commented that, evident from the pilot’s incredulous

¹⁴³ See Donahue, “Attacks on Foreign Civil Aircraft”, *supra* note 122 at 61.

tone, it was an exception to policy for Soviet interceptor pilots to shoot at passenger airlines.¹⁴⁴

American RC-135 reconnaissance aircraft use the 707 airframe, likely leading to the confusion by Soviet leaders. Only because those on the ground were convinced that KAL 902 was a spy aircraft, did the order to fire come.¹⁴⁵ While the lesson is subtle, it can be said that even the Soviets, who certainly had the most aggressive Cold War policy for intruders, realized that such a use of force against a civil airliner was not appropriate under international law.

The Shootdown of Korean Airlines Flight 007- 31 August 1983

On the night of this incident, Soviet air defense forces began tracking a suspected American RC-135 reconnaissance flight. They tracked this aircraft for 78 minutes and made a failed interception attempt over the Kamchatka Peninsula. A second attempt resulted in a successful interception just off Sakhalin Island, and Soviet fighters fired on the target, causing it to crash into the Sea of Japan southwest of Sakhalin Island. The target was not an RC-135, the seemingly ever-present American intruder that was also the suspect in the 1978 shootdown. It was Korean Airlines flight 007, off course on its path to Seoul, South Korea.

The international outcry was unprecedented. The U.S. Government called it a crime against humanity and said that such a shootdown of a foreign civil airliner violated international law.¹⁴⁶ Others followed suit. The Australian Government focused not on the location of the aircraft but rather its purpose, saying that it was never permissible to

¹⁴⁴ *Ibid.* at 61-62.

¹⁴⁵ See *ibid.* at 62.

¹⁴⁶ See Phelps, "Aerial intrusions", *supra* note 123 at 257.

shoot down an unarmed civil aircraft that had no military purpose.¹⁴⁷ The shootdown was denounced by a wide range of countries from the French and Italians to the PRC. At no point did the Soviets ever challenge the argument that customary international law prohibited the shootdown of civil aircraft.¹⁴⁸

This disapproval is strongly supportive of the principle that the use of force against civil aircraft is a violation of international law. However, despite its importance in Cold War politics and how its outcome affected events at ICAO regarding the approval of Article 3*bis* and Amendment 27 to Annex 2, it is of limited use because of its factual setting. The Soviets, however outrageously reckless they were, were likely operating under a belief that they were firing on a state aircraft that was violating their territory for an unfriendly purpose. KAL 007, without any intelligence gathering purpose, had flown over some of the most sensitive Russian military sites on the Kamchatka Peninsula and Sakhalin Island.¹⁴⁹ “[S]ome evidence suggests that neither the Soviet pilot nor ground controller ever appreciated that the target was a civilian passenger airliner.”¹⁵⁰ The visual identification was made from below, at an angle from which the silhouette of KAL 007 was similar to that of an RC-135. Because the Russian pilots never had an opportunity to see the most distinctive feature of the 747, the hump at the front of the aircraft, they simply assumed it was an RC-135 because it had 4 jet trails.¹⁵¹ The real lesson arising from the KAL 007 incident is not so much that it is illegal to shootdown civil aircraft, already a well-accepted rule, but that the Soviet procedures for the identification of

¹⁴⁷ See *ibid.* at 257.

¹⁴⁸ See Note, “Legal Argumentation in International Crisis: The Downing of Korean Air Lines Flight 007” (1984) 97 Harv. L. Rev. 1198 at 1201.

¹⁴⁹ See Hassan, “KAL 007”, *supra* note 126 at 556.

¹⁵⁰ Donahue, “Attacks on Foreign Civil Aircraft”, *supra* note 122 at 62.

¹⁵¹ See *ibid.* at 62. Bin Cheng believes that the Soviets simply assumed it was a U.S. reconnaissance aircraft as well. See Cheng, “Article 3*bis*” *supra* note 73 at 50.

hostile aircraft subject to attack were abysmally lacking.

The Shootdown of Iran Air Flight 655 – 3 July 1988

While the U.S. held the moral high ground in the KAL 007 incident, this would change when the *U.S.S. Vincennes* shot Iran Air flight 665 out of the sky off the coast of Iran. This shootdown was unique in that it was the first major shootdown involving surface fire. All other shootdowns had been conducted by interceptors, which by their nature make identification easier. To complicate matters in this case, the shootdown came contemporaneously with surface action against forces of the Islamic Revolutionary Guard.¹⁵²

The U.S. asserted that the shootdown of IR 655 was not a violation of international law, claiming that since the *U.S.S. Vincennes* acted in self-defense, albeit mistaken self-defense, the shootdown was not unlawful. As the argument goes, while the crew of the *Vincennes* mistakenly identified IR 655 as a threat, the mistake was reasonable, thereby relieving the U.S. of liability under international law.¹⁵³ This view was not widely accepted. Third State criticism was strong, but a subsequent resolution of the ICAO Council only reaffirmed the general international law prohibition on the use of force against civil aircraft.¹⁵⁴

Like the Libyan shootdown of 1973, the lesson to be learned from this case is less legal than it is factual. One can conclude that the factors relied upon by the crew of the *Vincennes* to make the determination that IR 655 was hostile and had to be destroyed were insufficient to afford sufficient protection to international civil aviation. The

¹⁵² See International Civil Aviation Organization, *Resolution and Report Concerning the Destruction of Iran Air Airbus on July 3, 1988*, 28 I.L.M. 896 at 908 [ICAO Report on IR 655].

¹⁵³ See Linnan, "Iran Air Flight 655", *supra* note 66 at 260.

¹⁵⁴ See ICAO Report on IR 655, *supra* note 152 at 899.

international community would simply require more positive identification before it would tolerate such shootdowns.

Brothers to the Rescue Shootdowns – 24 February 1996

The “Brothers to the Rescue” was a Miami-based Cuban exile group conducting private search and rescue missions in the Florida Straits looking for Cuban rafters. In addition to their search and rescue operations, they took up political protest as part of their flights, conducting up to 1,700 violations of Cuban airspace. Their operations became increasingly bold. One operation, on 13 January 1996, included an airdrop of Anti-Castro pamphlets over Havana.¹⁵⁵

The Cuban government was most unhappy with these flights, seeing their purpose as the destabilization the Cuban Government. This displeasure led Castro to plan a covert operation to disrupt BTTR activities. There is evidence that the Cubans intended to lure the BTTR aircraft out of U.S. airspace for the purpose of shooting them down, under an operation code-named “Scorpion.” Evidence suggests that they went so far as to have a Cuban Air Force officer defect to the U.S. to provide Cuba with information on BTTR flights.¹⁵⁶

If indeed this was the plan of the Cubans, it worked. On 24 February 1996, three small Cessna aircraft took off from Opa Laca Airport and flew out over the Florida Straits. The Cubans scrambled MiG-29s and intercepted and shot down two of the aircraft 16 & 21 miles off the Cuban shore, well into international waters. There was no

¹⁵⁵ See Joshua Spector, “The Cuba Triangle: Sovereign Immunity, Private Diplomacy and State (In-) Action, Reverberations of the ‘Brothers to the Rescue’ Case” (2001) 32 U. Miami Inter-Am L. Rev. 321 at 323 [Spector, “The Cuba Triangle”].

¹⁵⁶ See *ibid.* at 332-33; see also U.S., Federal Bureau of Investigation, Miami Office, *Federal Grand Jury Indicts Cuban MiG Pilots and a Cuban Air Force General for Murder of American Nationals in Connection with 1996 Shoot Down of Brothers to the Rescue Planes*, online: Federal Bureau of Investigation Miami Office <<http://miami.fbi.gov/pressrel/2003/mm082103a.htm>> [FBI Statement on BTTR Indictments].

doubt that the Cubans acted deliberately and intended to target civil aircraft. These aircraft were clearly labeled with "N" numbers, indicating U.S. registered aircraft. Additionally, the recordings of the pilots and ground control reveal that they indeed knew they were shooting at civil aircraft and that they were shooting to kill.¹⁵⁷ The attack against the aircraft came literally out of the blue. There were no warnings from the MiGs; there was only an earlier warning from the Havana tower not to come south of the 24th Parallel.¹⁵⁸

The U.S. reacted with anger to this shootdown. President Clinton himself took the opportunity to rebuke Cuba for this action.

These small aircraft were unarmed and clearly so. Cuban authorities knew that. The planes posed no credible threat to Cuba's security. Although the group that operated the planes had entered Cuban airspace in the past on other flights, this is no excuse for the attack and provides ... no legal basis under international law for the attack.¹⁵⁹

While the Cubans were not a party to Article 3*bis* at that time, the U.S. Secretary of State said that the prohibition against the use of force against civil aircraft is longstanding and a part of customary international law and does not rely on Article 3*bis*.¹⁶⁰ International outcry was strong as well. By a vote of 13-0-2, the UN Security Council condemned the shootdown, stating that it violated customary international law as contained in Article 3*bis* and the Annexes of the Chicago Convention.¹⁶¹

While the U.S. Attorney for the Southern District of Florida may have been

¹⁵⁷ See *Alejandro v. Republic of Cuba*, 996 F. Supp 1239 at 1244-46 (S.D. Florida 1997) [*Alejandro v. Cuba*].

¹⁵⁸ See Spector, "The Cuba Triangle" *supra* note 155 at 325-26.

¹⁵⁹ U.S., Department of State, *U.S. and the UN Respond to Cuban Shootdown of Civilian Aircraft*, President Clinton UN Security Council Presidential Statement (Vol. 7 US Department of State Dispatch 101) (1996).

¹⁶⁰ See "Cuba Elaborates on Sovereignty Violations" *Xinhua News Agency* (6 March 1996), online: LEXIS (News).

¹⁶¹ See "Security Council Condemns Use of Weapons Against Civil Aircraft; Calls on Cuba to Comply with International Law" *Federal News Service* (31 July 1996), online: LEXIS (News).

slightly over-supportive of the BTTR flights when he called them “defenseless U.S. nationals on a peaceful mission over international waters,”¹⁶² it is probably true that the dropping of leaflets by the BTTR was not a threat to the national security of Cuba.¹⁶³ The actions by the Cubans appeared more punitive than preventative. This case is important in determining what level of threat a civil aircraft has to pose before the international community will accept the use of force against it in flight.

The Shootdown of Drug Aircraft in South America – 1990s to Today

The shootdown of drug aircraft in South America is different from other shootdowns as it involves a series of shootdowns and not an isolated incident. Each shootdown of drug aircraft has one thing in common; there has been no international outcry in reaction to any such use of force against civil aircraft.¹⁶⁴ Even the shootdown of OB-1408 did not raise concerns internationally, but this may be because the victims were from the United States, a participant in the operation. One can take the position that the international community is unwilling to criticize such operations out of a desire to keep fingers from being pointed at their own domestic police operations. One could also take it a step further, saying that State practice may indeed be leading us to the creation of an internationally recognized exception to the prohibition against the shootdown of civil aircraft, at least as far as the South American experience has proven.

It is also interesting to note that this lack of outrage against the shooting down of domestic civil aircraft is not limited to general aviation. In a 1991 incident in Peru, police shot down a commercial airliner operated by Aerochasqui Airlines on a regularly scheduled flight, killing 15 people, after it was mistaken for an aircraft used by drug

¹⁶² *FBI Statement on BTTR Indictments*, *supra* note 156.

¹⁶³ See Johnson, “Shooting Down Drug Traffickers”, *supra* note 111 at 88.

¹⁶⁴ See Geiser, “Fog of Peace”, *supra* note 19 at 219.

traffickers.¹⁶⁵ Again, little was heard from the international community that would a few years later vehemently denounce Cuba's shootdown of the BTTR aircraft. While the police were eventually charged with murder, and may have been drunk when the incident happened, the lack of international outrage is important in the analysis of state practice.¹⁶⁶

b. Conclusions to be drawn from State Practice

While the practice of States is clouded by Cold War rhetoric, factual disputes, and grossly negligent misjudgments, some conclusions about the practice of States and customary international law can be drawn. The first concerns the class of shootdowns that can be classified as "intrusion shootdowns," namely the Air France attack, the El Al Shootdown, and the KAL shootdowns of 1978 and 1983. In each case, while the perpetrators may or may not have fully understood that they were shooting down civil aircraft, the reaction of the world community came from the perspective that they did indeed recognize these aircraft as civil in nature. The international reaction was overwhelmingly negative in each case. While these cases are very interesting factually, they are of limited value and largely irrelevant in today's world. In international relations, we are mostly beyond the shootdown of civil aircraft for mere trespass. It can therefore be said that it is never permissible under international law to shootdown a civil aircraft merely based on where it is. Simply put, "there is no per se right to use force based upon the mere violation of territorial airspace"¹⁶⁷

The BTTR shootdown, a lingering relic of the Cold War, can be seen as the last

¹⁶⁵ See "Police Shoot Down Commercial Airliner, Killing 17 People" *Agence France Presse* (11 July 1991), online: LEXIS (News). The crew was killed by machine gun fire and crashed, killing the passengers. See "Peru Minister Promises to Reform Police After Downing of Airplane" *Associated Press* (14 July 1991), online: LEXIS (News).

¹⁶⁶ See "Five Policemen Charged with Murder in Airplane Crash" *Agence France Presse*, (16 July 1991), online: LEXIS (News).

¹⁶⁷ Phelps, "Aerial intrusions", *supra* note 123 at 293.

nail in the coffin of the intrusion shootdown. Even if a foreign aircraft is engaging in or has in the past engaged in the misuse of civil aviation involving a trespass, that in and of itself is insufficient to justify the use of weapons. An analysis of the threat posed by the aircraft and a proportionate response to the threat is absolutely required. Another interesting conclusion that can be drawn from the BTTR shootdown is that general aviation is indeed included in the protections offered by customary international law. This is directly contrary to previous assertions that it covered only regularly scheduled commercial transportation and aircraft with flight plans. All international civil flights, including general aviation, are protected.

A more difficult area in which one can search for a conclusion is the situations under which a State may take action against a perceived threat, as was the case in the Libyan and IR 655 shootdowns. One could conclude that, because of the negative international reaction to these threats that were honestly but mistakenly perceived, the international community demands an "err on the side of caution" standard for determining self-defense. For example, the perceived threat posed to the *Vincennes* by IR 655 was simply not sufficient to justify the shootdown.¹⁶⁸

Such a conclusion is historically true and would probably still be operative, had 9/11 not occurred. After 9/11, we can probably say that the rule has moved farther toward the "err on the side of shootdown" end of the spectrum as opposed to the

¹⁶⁸ The following were factors used by the U.S.S. *Vincennes* in determining IR 655 hostile: 1. The Flight profile, which includes such things as speed range, rate of climb/decent, rate of turn, and altitude, 2. Electronic emissions from suspect aircraft, 3. Radio communications, 4. IFF Mode 3 responses. In addition, the following were also factors that were specific to IR 655: 1. IR 655 took off from Bandar Abbas, a joint civilian/military aerodrome, 2. Recent deployment of Iranian F-14s to Bander Abbas, 3. The possibility of Iranian Air Force being used in an air support role for the ongoing surface engagements, 4. An unrelated IFF mode 2 response, 5. The inability to correlate IR 655 to a scheduled civil flight, 6. IR 655 had already labeled an F-14, 7. Incorrect reports that IR 655 had maneuvered into an attack profile, 8. IR 655 was not directly on the centerline of airway A59. *ICAO Report on IR655*, *supra* note 152 at 913, 923-24.

conclusions drawn from the pre-9/11 cases. The mass movement to implement shutdown policies is evidence of this, and a true change in world views will be tested as soon as the first post-9/11 shutdown takes place, especially if it involves a mistake. How forgiving the world will be will likely depend on how fresh the memories of 9/11 still are at that time.

While no one would doubt the propriety of shooting down a civil aircraft on a suicide mission, the BTTR shutdown has set at least a minimum level as to what a threat must be. As one author noted, “the core question raised by this incident is whether the use of civil aircraft for [private] political purposes intended to destabilize a government is sufficiently threatening to that government to warrant the use of weapons.”¹⁶⁹ The answer is a resounding no. Under the current state of international law, any planned shutdown on a civil aircraft believed to be hostile must at least pose a greater danger than did the three light aircraft in the BTTR case.

Another sweeping conclusion can be made as to operations that are purely domestic in nature. So long as a State is acting inside an area of its own sovereign control against its own registered aircraft, the world community does not seem willing to pass judgment. Such a standard is probably not limited to drug aircraft. It is not unknown in the domestic law of States to have internal laws that allow for the use of force against aircraft that penetrate restricted zones and do not obey the orders of the authorities.¹⁷⁰ Such actions will likely be subject only to human rights law.

C. Human Rights Law

One must understand that law enforcement operations conducted on the ground

¹⁶⁹ Geiser, “Fog of Peace”, *supra* note 19 at 229.

¹⁷⁰ See Park, *Souveraineté Aérienne*, *supra* note 96 at 317, note 94.

are fundamentally different from those conducted against aircraft in flight. While the police may pull over a vehicle suspected of being involved in a criminal offense, the opportunity to "pull over" an aircraft is almost completely limited to the pilot's willingness to comply. The inability or unwillingness on the part of a pilot to follow instructions to land may result in the decision to use weapons in order to force the aircraft to comply or to terminate the flight altogether. Should a vehicle on the ground fail to follow orders to stop, police may employ devices to disable the vehicle or may even resort to more forcible measures, such as shooting out the tires. This is similar to action taken by the U.S. Coast Guard against so-called "go-fasts," high speed drug boats used by smugglers. Only in the most extreme situations will deadly force be authorized. The one law that distinguishes operations against aircraft in flight from potential targets on the ground or on the water is the law of gravity. The use of force against an aircraft in flight is, in most circumstances, the equivalent of a death sentence for all on board. Such killings could inevitably raise concerns under human rights law.

1. Human Rights and the Right to Life

The law of human rights is grounded in a multitude of international agreements, UN Resolutions, statutes, and jurisprudence of international criminal tribunals and state practice. This area of law is concerned with how States treat persons within their own sovereign control. Violations can come in many forms, from torture and the deprivation of life to the withholding of economic and civil rights.

At the apex of human rights law is the right to life. Reference to this right is found time and again in human rights law. The Universal Declaration of Human

Rights¹⁷¹ is the cornerstone of modern human rights law. While it is only a General Assembly resolution, it is widely seen as reflective of customary international law. The right to life as found in the UDHR is as follows: "Everyone has the right to life, liberty and security of person."¹⁷² The right to life is not subject to arbitrary forfeiture, even in the event of the commission of a serious crime. The UDHR provides that all persons charged with a crime have "the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."¹⁷³

This customary right is found in a number of multilateral treaties, the most widely applicable of which is the International Covenant on Civil and Political Rights.¹⁷⁴ The ICCPR mandates that

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life [The death] penalty can only be carried out pursuant to a final judgment rendered by a competent court.¹⁷⁵

This is an obligation from which there can be no derogation. Additionally, the right to life is found in other international instruments. The European Convention on Human Rights provides that

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following conviction of a crime for which this penalty is provided by law.¹⁷⁶

A similar provision is found in the American Convention on Human Rights.

¹⁷¹ GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [UDHR].

¹⁷² *Ibid.* at Article 3.

¹⁷³ *Ibid.* at Article 11.

¹⁷⁴ 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) [ICCPR].

¹⁷⁵ *Ibid.* at Article 6.

¹⁷⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms*, November 1950, 213 U.N.T.S. 222, Eur. T.S. No. 5 (entered into force 3 September 1953) at art. 2(1).

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.¹⁷⁷

The prohibition on the arbitrary taking of human life by the State is summed up in the Restatement on Foreign Relations, which provides that a State is in violation of international law "if, as a matter of state policy, it practices, encourages, or condones ... the murder or causing the disappearance of individuals"¹⁷⁸ The arbitrary taking of human life is known as an "extrajudicial killing" when committed by police, military, and security forces. The prohibition is clearly a general prohibition applicable to all States under international law, and would be applicable to shootdown operations conducted under the ABDP. However, this is not to imply that every killing, even those conducted in ABDP shootdowns, is a violation of that right. A closer look must be taken at how the right to life intersects with law enforcement's duty to enforce the law.

2. Extrajudicial Killings and Law Enforcement

The fact that the prohibition against extrajudicial killing is a binding norm of international law does not mean that there exists a strict rule against the use of deadly force by those commissioned with enforcing the laws of a State. Such a rule fails to take into account the safety of the officers and the general public, as well as the fact there are criminals who will simply not allow themselves to be taken alive just to allow the State the opportunity to afford them the required due process.¹⁷⁹ But it does raise the question

¹⁷⁷ 1144 U.N.T.S. 123, O.A.S.T.S. 1970 No. 36, 9 I.L.M. 673, 22 November 1969 (entered into force 18 July 1978) at art. 4.

¹⁷⁸ American Law Institute, *Restatement of the Law (Third): The Foreign Relations Law of the United States*, vol. 2 (St. Paul, Minn.: American Law Institute Publishers, 1987), at sec. 702 [*ALI: Restatement on Foreign Relations*].

¹⁷⁹ A very interesting argument has been made that even the killing of Uday and Qusay Hussein in Iraq was an extrajudicial killing. Marjorie Cohn, "Human Rights: Casualty of the War on Terror" (2003) 25 San Diego Justice J. 317, online (LEXIS). This is a very dubious assertion. Some persons, like the Hussein brothers, are not interested in their day in court.

of how one determines the line between the lawful application of deadly force and the illegal extrajudicial killing of persons.¹⁸⁰

A general answer may be found in the opinions of the international community and in the practice of States. As a starting point, we can look to the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,¹⁸¹ which were formulated to “assist Member States in their task of ensuring and promoting the proper role of law enforcement officials.”¹⁸²

Law enforcement officials ... shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

- (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
- (b) Minimize damage and injury, and respect and preserve human life;

....

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

[L]aw enforcement officials shall identify themselves as such and give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious

¹⁸⁰ Even the United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary, and Summary Executions, despite being quite extensive in its recommendations, do not endeavor to formulate an appropriate situation in which force may and may not be used. ESC Res. 44/162, UN ESC, 1989, Supp. No. 1, UN Doc. E/1989/89 (1989).

¹⁸¹ UNHCR, 1990, UN Doc. A/CONF.144/28/Rev.1, online: United Nations High Commissioner on Refugees <www.unhcr.ch/html/menu3/b/h_comp43.htm>.

¹⁸² *Ibid.*, at preamble.

harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.¹⁸³

The focus of the Basic Principles is to limit the use of deadly force to situations involving the protection of life; however, there are circumstances under which a killing may take place in situations short of the protection of life. In American practice, the requirement is broadened to include the protection of so-called "critical infrastructure" as well. For example, the GARDEN PLOT Rules of Engagement, in force for the most extreme U.S. domestic emergency situations, include, in addition to self-defense and the defense of others, the prevention of crime that involves the imminent danger of death or serious bodily injury, the prevention of the escape of persons who pose imminent danger of death or serious bodily injury, and the prevention of the destruction of critical infrastructure as circumstances in which deadly force may be used.¹⁸⁴ Even then, it is only authorized when lesser means have been exhausted and there is no significant increase in the risk of death or serious bodily harm to others. The Restatement goes a bit further, making a general exception to the right to life in the prevention of certain crimes:

[I]t is a violation of international law for a state to kill an individual other than as lawful punishment pursuant to conviction in accordance with due process of law, or as necessary under exigent circumstances, for example by police officials in line of duty in defense of themselves or of other

¹⁸³ *Ibid.*, at arts. 4, 5, 9, 10.

¹⁸⁴ See U.S., Center for Law and Military Operations, *Domestic Operational Law (DOPLAW) Handbook for Judge Advocates* (Charlottesville, CLAMO, 2001) at 71. It could also be used in situations to prevent crime, such as the prevention of the theft of "vital" assets and property inherently dangerous to others. See W.A. Stafford, "How to Keep Military Personnel from Going to Jail for Doing the Right Thing: Jurisdiction, ROE, & the Rules of Deadly Force" (2000) 2000 Army Law. 1 at 6 [Stafford, "How to Keep Military Personnel from Going to Jail"]. Most rules on the use of force for U.S. law enforcement agencies only allow for the use of deadly force to protect life and prevent serious bodily injury, but there do exist specific rules on when deadly force can be used to prevent crime. See *DHS Standards for Enforcement Activities*, 8 C.F.R. sec. 287.8 (2003) (Immigration officers may only use deadly force to protect from death or serious bodily injury), see also *NASA Security Programs; Arrest Authority and the Use of Force by NASA Security Force Personnel*, 14 C.F.R. sec. 1203b.106, compare to *DOE Limited Arrest and Use of Force by Protective Force Officers*, 10 C.F.R. sec. 1047.7 (Authorizing the use of deadly force to prevent the theft and sabotage of nuclear weapons or nuclear explosive devices).

innocent persons, or to *prevent serious crime*.¹⁸⁵

The concept of an extrajudicial killing centers on the lack of due process. The U.S. Government has recognized that the shootdown of civil aircraft suspected of carrying drugs could violate the U.S. Constitution as a violation of due process, a concept that is not unlike the same notion under international law.¹⁸⁶

In international law, the due process standard that is to be applied before the use of deadly force is authorized is found in the case of *Garcia and Garza v. United States*, heard before the U.S.-Mexican Claims Commission.¹⁸⁷ In April 1919, Garcia and Garza's infant daughter was killed by an officer with the U.S. Cavalry whose unit was charged with enforcing laws against illegal crossing and smuggling on the Mexican border. The officer fired on the girl's raft, which was making an illegal crossing on the Rio Grande River.¹⁸⁸ In holding that international law did indeed forbid the taking of human life, the tribunal held that the following criteria were required before the resort to deadly force was legal under international law:

- An offense must be sufficiently established;
- The importance of preventing or repressing the offense by force must be in proportion to the danger arising from it;
- The firing should not be undertaken if there are other ways of preventing or repressing the offense; and,
- There must be sufficient precaution not to create unnecessary danger, unless it is the intention to hit, wound, or kill.¹⁸⁹

The tribunal noted that the most serious offense of which the occupants of the raft

¹⁸⁵ ALI, *Restatement on Foreign Relations*, *supra* note 178 at sec. 702 comment f. (emphasis added).

¹⁸⁶ See *October 1989 Position Paper*, *supra* note 13.

¹⁸⁷ *Teodoro Garcia and M. A. Garza v. United States* (1926), 21 A.J.I.L. 581, (U.S.-Mexican Claims Commission).

¹⁸⁸ See *ibid.* at 582.

¹⁸⁹ See *ibid.* at 584.

were suspected of committing was smuggling mescal into the United States.¹⁹⁰ Had the crime being committed been more serious, deadly force might have been authorized. Also, due process imposes the duty to warn before deadly force is used. Such a warning gives the perpetrator the chance to choose compliance with the instructions of law enforcement and submission to the judicial process before facing deadly force. The right to life as it interplays with the duties of law enforcement can be summed up as follows. The right to life is limited by "the right to self-defense, acting in defense of others, the prevention of serious crime involving a grave threat to life or serious injury, and the use of force to arrest or prevent the escape of persons presenting such threats."¹⁹¹

3. Human Rights and the Shootdown of Civil Aircraft

There is little doubt that human rights norms are applicable to the shootdown of civil aircraft.¹⁹² For example, in *Alejandro v. Republic of Cuba*, a U.S. Federal Judge held that the destruction of the BTTR aircraft and the resulting deaths of those aboard was an extrajudicial killing under U.S. law, applying a standard similar to the international standard.¹⁹³ The UN Security Council also hinted at its concern over the human rights implications of the BTTR shootdown in its first statement on the matter shortly after the shootdown in which it reminded States of the obligation "to respect

¹⁹⁰ See *Ibid.* In another military border incident decades later, U.S. Marines on a counter-drug mission on the Mexican border shot and killed a 17 year old boy. What distinguishes this from the Garcia and Garza case is that the boy was not summarily shot out of some notion of crime prevention. He had fired two shots at the marines and had raised his weapon apparently to fire again when he was killed. Nonetheless, the State of Texas initiated a homicide investigation against the Marines. See Stafford, "How to Keep Military Personnel from Going to Jail", *supra* note 184 at 1.

¹⁹¹ Kenneth Watkin, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict" (2004) 98 A.J.I.L. 1 at 10.

¹⁹² However, as shall be discussed below, the right to life referred to in this section differs in its form in wartime where it is governed by special rules applicable to armed conflict.

¹⁹³ *Alejandro v. Cuba*, *supra* note 157 at 1242. "The unprovoked firing of deadly rockets at defenseless, unarmed civilian aircraft undoubtedly comes within the statute's meaning of 'extrajudicial killing.'" (*ibid.* at 1248). Although it was an extrajudicial killing under U.S. law, not necessarily under international law, the judge did refer to it as a violation of basic human rights. (*Ibid.* at 1242).

international law and human rights norms in all circumstances.”¹⁹⁴ In a later, more direct statement, the Council concluded that the Cuban shootdown was against the “elementary considerations of humanity.”¹⁹⁵

Professor Milde has summed up the application of human rights law to the shootdown of civil aircraft quite well in the following:

All States possess within the existing framework of the Chicago Convention full jurisdiction in the application of their respective laws to prevent or prohibit the use of civil aircraft for unlawful purposes. The practical problem therefore does not appear to arise in the field of the applicability of particular laws but in the field of *practical enforcement* of such laws with respect to aircraft, particularly aircraft in flight The practical enforcement of legal obligations involves a *legal procedure* which in the case of criminal acts would include the arrest and taking into custody of the suspected offender, collection and preservation of pertinent evidence, judicial evaluation of the evidence and evaluation of the points of defense, judicial conviction, sentencing and execution of the judgment. All aspects of such legal procedures are governed by *lex fori* That law would determine ... what degree of force (including armed force) may be legally employed in the process of arrest of the suspected offender; as a rule, that level of force is to be proportionate and adequate to the level of public danger created by the suspected offender and the level of force used by the suspected offender in resisting arrest. The applicable legal procedure is determined by the sovereign States and “the general principles of law recognized by civilized nations” are elements of the general international law, including the general concept of human rights ... presumption of innocence [and] the requirement of “due process”
.....¹⁹⁶

As Professor Milde correctly notes, due process is one of the keys to the legality of all State killings, including those done through the shootdown of civil aircraft. Due process consists of making some type of effort to get the individual to surrender and face established criminal justice and the application of the subsequent judicial procedures for the determination of guilt and innocence. International law requires the exhaustion of all

¹⁹⁴ SC, *Statement on the Shooting down by the Cuban Air Force of Two Civil Aircraft*, UN Doc. S/PRST/1996/9, (1996) reprinted in 35 I.L.M. 493 (1996).

¹⁹⁵ SC Res. 1067, UN SC, 3683rd meeting, U.N. Doc. S/RES/1067 (1996).

¹⁹⁶ Milde, “Interception of Civil Aircraft”, *supra* note 90 at 124-25.

measures before resorting to deadly force.¹⁹⁷ It therefore follows that ABDP shutdown operations require some form of due process. In particular, due process in these cases comes from the proper identification of suspect aircraft and from the use of appropriate measures to allow suspects to land and surrender before being subjected to deadly force. So long as the threat posed by drug trafficking is a serious enough crime and suspects are properly identified and given an opportunity to submit to justice, ABDP operations would generally fall within the realm of legitimate law enforcement and would not fall short of recognized human rights norms.

This is not to suggest that the violation of human rights does not take place in the war on drugs. One example from Thailand typifies what is probably contemplated in terms of human rights violations in the form of extrajudicial killing in the fight against drug trafficking. In Thailand, more than 600 people suspected of engaging in the drug trade were killed in just 3 weeks. "[T]he government's campaign against drug[] trafficking has been a *de facto* shoot-to-kill policy of anyone believed to be involved in the drug[] trade."¹⁹⁸ Another good example comes from Mexico, where the investigation of an anti-drug army unit found that five drug traffickers had not been killed in a shoot-out as claimed, but had rather been captured, tortured, and executed.¹⁹⁹ The killing in lieu of arrest seems to be the trigger for a human rights violation. Support for such a standard can be found in a similar case that deals with terrorists rather than drug traffickers. In a statement by the U.S. Section of Amnesty International, it was noted that

¹⁹⁷ See *Alejandro v. Cuba*, *supra* note 157 at 1246.

¹⁹⁸ Amnesty International Press Release, "Thailand: Extrajudicial killing is not the Way to Suppress Drug Trafficking", 20 February 2003, online, Amnesty International <<http://web.amnesty.org/library/Index/engASA390012003?OpenDocument&of=COUNTRIES%5CTHAILAND>>.

¹⁹⁹ See Jeremiah E. Goulka, "A New Strategy for Human Rights Protection: Learning from Narcotics Trafficking in Mexico" (2001) 9 *Cardozo J. Int'l & Comp. L.* 231 at 245.

the killing of the al-Qaeda members in Yemen by a U.S. Predator drone was an extrajudicial killing if the suspects were killed *in lieu of* being arrested and did not pose an *immediate threat*.²⁰⁰ However, it seems that ABDP operations as put on paper make sufficient efforts, through the requirement of pilots to file flight plans, the real-time monitoring of flights, and the use of ICAO Standards, to positively identify suspects. Additionally, it appears that sufficient efforts are required to compel a landing in lieu of a shootdown if the pilot chooses to comply. However, it is clear that ABDP shootdowns could run afoul of human rights norms in its implementation in the field, as was the case with the shootdown of OB-1408.

IV. Circumstances Under Which International Law Could Permit the Shootdown of Civil Aircraft

It has been correctly noted that “an attempt to apply Article 3*bis* and customary international law [or any other law for that matter] in a manner that deprives nations of any practical remedy adequately serving their vital interests is doomed to failure.”²⁰¹ In

²⁰⁰ See Klug, “Civil Liberties” *supra* note 69 at 380.

²⁰¹ Johnson, “Shooting Down Drug Traffickers”, *supra* note 111 at 90. Some have proposed alternative tests for the legality of the shootdown of civil aircraft, both before and after the adoption of Article 3*bis*. Several have proposed tests based on a “military purpose” analysis. For example, Oliver Lissitzyn has postulated that civil aircraft could be shot down if: they refused to land when instructed, there was a current state of hostilities or tension, and there was a reasonable suspicion that the aircraft was being used for some military purpose. Donahue, “Attacks on Foreign Civil Aircraft”, *supra* note 122 at 65. A similar test would have allowed for the shootdown of civil aircraft if under the totality of the circumstances there is a reasonable suspicion that the aircraft is being used for a military purpose likely to result in death or damage a significant objective. (*ibid.* at 68). Still another suggests changing the Article 3*bis* language from “must refrain” into a standard based on a reasonable belief that the aircraft is planned on being used as a weapon. Shewsbury, “Single European Sky”, *supra* note 118 at 153. The real problem with these tests is that they are redundant. An aircraft being used for a military purpose will likely lose its civil aircraft status, as Article 3(c) of Chicago is function-based, and will therefore be subject to attack anyway after losing the protections of international law afforded to civil aircraft. Other tests are more broad. Another called for States to apply a “threat to vital interests” test before using force against a civil airliner. See Geiser, “Fog of Peace”, *supra* note 19 at 208. The Aircraft Owners and Pilots Association, a long-time critic of the ABDP shootdowns, issued a statement indicating that the organization opposes using deadly force against civilian aircraft not posing a threat to national security, implying that force could be used against civil aircraft posing such a threat. See “The U.S. Resumed the Drug Interdiction Program with Columbia” (2003) 93 Business & Commercial Aviation 30. These tests are more broad than others above. These tests would

the absence of appropriate remedies allowing States the ability to protect their vital national interests, States will simply justify their conduct on self-defense under Article 51 of the Charter, thereby leading to greater and greater misinterpretation of the law of self-defense. What is needed is not a complete revision of international law on the shootdown of civil aircraft in flight; it is rather the recognition that while certain actions may be illegal under international law, deviations from that law may be excused in some circumstances. The international law regarding the shootdown of civil aircraft is no exception. It is certain that international law exists in some form prohibiting the use of force against civil aircraft in flight. However, just as domestic law has excuses or defenses that prevent otherwise wrongful conduct from being unlawful in certain circumstances without jeopardizing the validity of the underlying law, international law allows for similar justifications without abrogating the underlying legal obligation.

The law of treaties governs the law to be applied in the formation, performance, and termination of treaties, including the law on determining when a binding norm of treaty law is no longer in force. It is, however, distinct from the international law of state responsibility, wherein we find many of the circumstances that preclude wrongfulness, which are more of a case by case examination of justifications for deviations from international law.²⁰² It has been held by the ICJ that “the law of treaties and state responsibility were applicable sequentially to the same situation and that the ‘circumstances precluding wrongfulness’ contained in the draft articles could provide an

likely meet both the needs of the State in regards to security and simultaneously protect civil aircraft to an appreciable degree.

²⁰² See *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] I.C.J. Rep. 7 para. 47 [*Gabčíkovo-Nagymaros Case*].

excuse for the non-performance of a treaty obligation.”²⁰³ They can also serve the same function for obligations found elsewhere in international law, including obligations under customary international law.

It has been asserted that self-defense under Article 51 of the UN Charter is the only circumstance in which international law would excuse the shootdown of civil aircraft.²⁰⁴ However, a simple application of several scenarios proves that this cannot be the case. The international community would certainly have not condemned Cuba as it did in the BTTR shootdowns had the BTTR pilots been engaging in activity hazardous to human life, as opposed to political and propaganda activity. It would be unlikely that any activity perpetrated by small Cessna aircraft, short of perhaps a biological or chemical attack, would amount to an “armed attack” under international law, the trigger for the invocation of self-defense under Article 51. However, such a shootdown would have probably been seen as a lawful operation, but under what legal authority? Additionally, would international law not certainly allow for the destruction of an errant aircraft, such as the one in which golfer Payne Stewart was killed, after it went out of control and crashed, if the impending impact threatened lives on the ground? The answer is absolutely yes, although, again such a threat would certainly not be an armed attack. Since it is certain that there exist other circumstances, short of an armed attack and the corresponding right of self-defense, in which the shootdown of civil aircraft would be authorized, it is necessary to closely examine the circumstances that preclude wrongfulness under international law and to apply the relevant norms to potential

²⁰³ James Crawford & Simon Olleson, “The Exception of Non-Performance: Links between the Law of Treaties and the Law of State Responsibility” (2001) 21 *Australian Year Book of International Law* 1 at 3.

²⁰⁴ See Sompong Sucharitkul, “Procedure for the Protection of Civil Aircraft in Flight” (1994) 16 *Loy. L.A. Int’l & Comp L.J.* 513 at 516, 528, *Opinion of the Office of Legal Counsel, supra* note 22 at 6-7, *October 1989 Position Paper, supra* note 13.

shootdown operations. Armed with such information, one will be better able to determine the types of situations under international law in which the shootdown of a civil aircraft in flight would be excused.

Peru and Columbia have found no need to put forth any such international justification for their ABDP shootdown operations. These countries have focused solely on sovereignty over national airspace under Article 1 of the Chicago Convention. These countries see it as a domestic law issue only, but this is not the case. While there are certainly domestic law issues contained in ABDP shootdowns, such shootdown operations, especially in the tri-border region of Columbia, Peru, and Brazil, are inherently international in character. This is certainly the view of the United States. Secretary Rumsfeld, at the restarting of the Colombian arm of the program, said ABDP is not a single country issue.²⁰⁵ Evidence shows that the target flights routinely cross the international boundaries of these three countries. Therefore, one cannot simply call the ABDP a domestic issue and ignore the search for international justification. While Columbia, Peru, and, in the near future, Brazil will likely not complain when their nationally registered aircraft²⁰⁶ are shot down over one of the other countries, there will probably be international outrage, along with accusations of violations of international law, when a mistake like the one in the OB-1408 scenario leads to the accidental shootdown of an aircraft from a country not involved in ABDP operations or when

²⁰⁵ See "Donald H. Rumsfeld Holds a News Conference with Colombian Minister of Defense Ramirez" *Federal Document Clearing House* (19 August 2003), online: LEXIS (News) ["Rumsfeld-Ramirez News Conference"].

²⁰⁶ The reliance on conducting a shootdown operation based on the registration of an aircraft is somewhat absurd. Aircraft engaged in drug trafficking might not display any registration, just as it is common for waterborne smugglers to not fly a flag of registration. See Rachel Canty, "Developing Use of Force Doctrine: A Legal Case Study of the Coast Guard's Airborne Use of Force" (2000) 31 U. Miami Inter-Am. L. Rev. 357 at 372 [Canty, "Coast Guard Use of Force"]. In fact, the DoJ has noted that trafficking aircraft often obscure or paint over registration numbers. *Opinion of the Office of Legal Counsel*, *supra* note 22 at 13, note 12.

nationals of another country are accidentally killed in a shootdown operation.

It would be quite easy for countries not involved in ABDP to simply classify the issues as domestic ones to be left to the discretion of States. Such an approach is filled with danger. We must remember that we are dealing with an issue of the international movement of aircraft, albeit mostly in terms of general aviation. As such, the interests of all nations are involved. We should not rely on "sovereignty," nor should we allow the development of a regional custom justifying such shootdowns. This could lead to a needless broadening of the law to a degree that may eventually lead the world to call into question its own condemnation of Cuba in the BTTR shootdown, which could have just as easily been justified on sovereignty grounds. International law as it stands is broad enough to allow States to deviate from compliance with established norms to respond to an armed attack, to conduct armed conflict, to preserve human life, and to protect the essential interests of the State. It need not go further.

A. Self-Defense

1. The Inherent Right of Self-Defense

The first legal justification for the shootdown of civil aircraft that requires examination is also the one with the most international support: self-defense. This defense is particularly interesting in today's world. On 9/11, 19 terrorists on a shoestring budget "transformed the three aircraft and the 200,000 pounds of jet fuel into weapons of mass destruction"²⁰⁷ While 9/11 brought the threat of attack by civil airliners to the forefront, this threat was certainly not created on 9/11. In a case in the 1970s, the Saudis had evidence that three hijackers aboard a JAL aircraft were pilots who planned to crash

²⁰⁷ Matthew Lippman, "The New Terrorism and International Law" (2003) 10 *Tulsa J. Comp. & Int'l L.* 297. [Lippman, "New Terrorism"].

a hijacked jet into a populated area of Israel or into a Saudi oil installation.²⁰⁸ Both the Saudis and Israelis were prepared to shoot the aircraft down. In another example, U.S. F-102s sitting alert for NORAD were scrambled and ordered to arm their missiles in response to a hijacked Southern Airways DC-9. The Cuban hijackers had threatened to crash the aircraft into any number of critical areas, including nuclear facilities and the President's summer home.²⁰⁹ While these attacks never happened, they, along with the attacks of 9/11, are examples of the most likely scenarios in which a civil airliner will be used to attack. The major question is which acts of this nature invoke the right of self-defense.

The right to respond to an armed attack in self defense has been codified in Article 51 of the UN Charter.

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.²¹⁰

While its place in the UN Charter scheme on the regulation of armed force is as an exception to the prohibition on the use of force under Article 2(4), it is recognized as a circumstance precluding wrongfulness for internationally wrongful acts under the Draft Rules on State Responsibility as well.²¹¹ The "inherent right" of self defense is also part of customary international law, and it is triggered in all cases by an "armed attack," which is not defined in the Charter or other treaty law or in customary international

²⁰⁸ See "Israelis, Saudis Planned to Down Hijacked JAL Plane in 1973" *Japan Economic Newswire* (2 January 2004), online: LEXIS (News).

²⁰⁹ See "9/11 Scenario Faced in 1972, Airmen Confronted Possibility of Having to Shoot Down a Hijacked Airplane" *Richmond [Virginia] Times Dispatch* (1 December 2003) B-1.

²¹⁰ UN Charter, *supra* note 60 at art. 51.

²¹¹ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, (2001), Article 24(2) online: International Law Commission <[http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles\(e\).pdf](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf)> [*Draft Articles on State Responsibility*].

law.²¹² One can see that with armed attack as the requirement, the bar to trigger self-defense has been set deliberately high. To determine whether such a standard is met, one must look at two separate issues: the affiliation of those carrying out the attack, and the severity of the attack. The answers to these two issues will determine if there is indeed an armed attack in a potential shootdown situation.

a. The Originator of the Armed Attack

When Article 3*bis* was drafted, the State was seen as the major threat to international peace and security and as the likely misuser of civil aviation as a threat against another State. That is why its language alluded to the right of States to act in self-defense when threatened by civil aircraft. If a State uses civil aircraft to commit an armed attack, there would be no objection to the shootdown of that aircraft in self-defense.

But does the law of self-defense afford the same right to States when actors commit armed attacks in the name of themselves and not a State? Such private entities are more likely today than States to be the perpetrators of such acts using civil aircraft. It is implicit in Article 51 of the Charter that an armed attack must originate from a State. An armed attack is a subcategory of aggression that has been recognized as something that comes from an act of a State and not private actors.²¹³ This point of view is shared by Judge Antonio Cassese. He believes that self-defense is only justified by the actions of an aggressor State and that calling the use of aircraft as weapons by a private group, as

²¹² See *Nicaragua Case*, *supra* note 120 at para. 176.

²¹³ See Giorgio Gaja, "In What Sense was There an 'Armed Attack?'" (2001), online: *European Journal of International Law*, <www.ejil.org/forum_WTC/ny-gaja.html>.

happened on 9/11, an “armed attack” would be a broadening of self-defense.²¹⁴ It has been noted that “[t]he United Nations Charter is an agreement among nations and does not authorize actions against individual persons.”²¹⁵ This view would lead to the conclusion that there would have been no right of self-defense available to the U.S. on 9/11, as there was no attack by a State. This view is certainly not without support.

The problem with this view of self-defense is that it ignores the danger posed by private actors, especially when they are “armed” with fuel-laden aircraft or perhaps even more dangerous devices. However, there is growing support, especially after 9/11, for the consideration of such acts of terrorists or other private actors as “armed attacks,” and thus triggering the inherent right of self-defense. The Charter’s language does not limit self-defense to armed attacks committed by States. “An interpretation extending the right of self-defense to attacks by non-State actors is ... consistent with both the ordinary meaning of the text [of the Charter] and the purposes of the United Nations.”²¹⁶ The concept of an armed attack was left deliberately open to the interpretation of Member States and UN Organs, and the wording is broad enough to include the acts of non-State actors as “armed attacks.”²¹⁷ Such an interpretation would be consistent with the evolution of world realities, as non-State actors are an increasing threat today.

The UN Security Council seems to have agreed. The Security Council referred to

²¹⁴ See Antonio Cassese, “Terrorism is Also Disrupting Some Crucial Legal Categories of International Law” (2001) 12 E.J.I.L. 993 at 997.

²¹⁵ Steven B. Stokdyk, “Airborne Drug Trafficking Deterrence: Can a Shootdown Policy Fly?” (1991) 38 UCLA L. Rev. 1287 at 1309 [Stokdyk, “Shootdown Policy”].

²¹⁶ Michael N. Schmitt, “*Bellum Americanum* Revisited: U.S. National Security and the *Jus ad Bellum*” (2003) 176 Mil. L. Rev. 364 at 384 [Schmitt, “*Bellum Americanum* Revisited”].

²¹⁷ See Carsten Stahn, “Terrorist Acts as ‘Armed Attack’: The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism” (2003) 27 Fletcher Forum of World Affairs 35 at 35-36 [Stahn, “Self-Defense”]. The author bases this accretion on the reaction to the September 11th attacks. “The first lesson on September 11 is the almost unanimous recognition in state practice that acts of terrorism carried out by independent private actors fit within the parameters of Article 51.” (*ibid.* at 37).

the right to self-defense in Security Council Resolutions 1368 and 1373, made shortly after 9/11, with the full understanding by the world that Osama bin Ladin's al-Qaeda network was likely responsible for the attacks. It appears that the world has accepted this self-defense justification for the war in Afghanistan, aimed not only at the government but also at the non-State actors that perpetrated 9/11.²¹⁸ While the use of force against terrorists has become more and more acceptable under a self-defense theory, it will have increasing applicability to the justification of the shootdown of civil aircraft. Defending against activities by non-State entities engaged in the misuse of civil aviation to attack will be included in a State's rights under self-defense. This will take the focus off of the identity of the attacker and put it on the act itself.

b. The Measure of an Armed Attack

Professor Schmitt has recognized that "[w]hile it has become plain that non-State actors can be the source of an 'armed attack' under the law of self-defense, the issue of when an individual act of terrorism [or any private violent act for that matter] will rise to that level is murkier."²¹⁹ Low level violence will generally not constitute an armed attack. For an act to be an armed attack, it must be of "sufficient scale and effects"²²⁰ Judge Cassese has echoed this, saying that the use of force is not authorized against sporadic or minor attacks.²²¹ For example, the ICJ has held that mere frontier incidents are not necessarily armed attacks, nor is the provision of weapons or logistical support to an armed band,²²² as an attack must be "most grave" in order to trigger the inherent right

²¹⁸ See Klug, "Civil Liberties", *supra* note 69 at 372.

²¹⁹ Schmitt, "Bellum Americanum Revisited", *supra* note 216 at 387.

²²⁰ *Ibid.* at para. 195. This test has rightfully been described as an "incentive to low-intensity violence." Stahn, "Self-Defense", *supra* note 217 at 45.

²²¹ See Antonio Cassese, "The International Community's 'Legal' Response to Terrorism" (1989) 38 I.C.L.Q. 589 at 596.

²²² See *Nicaragua Case*, *supra* note 120 at para. 195.

of self-defense.²²³ Therefore, while self-defense might be applicable to the acts of terrorists and other private actors as well as States, the potential for such an attack to justify the shootdown of a civil aircraft seems limited. Most attacks by a single aircraft, especially a general aviation aircraft, would probably not rise to a sufficient scale to amount to an armed attack under the test put forth by the ICJ.²²⁴ The events of 9/11 would be the obvious exception. Thus, a literal application of the test to measure an armed attack would require awaiting an attack by a civil aircraft and either determining its severity before acting, or guessing as to the expected gravity of the potential attack and conducting shootdown operations accordingly. Such an application makes self-defense a very unworkable defense in a shootdown scenario.

It would seem that the potential for the use of self-defense as a justification for the shootdown of civil aircraft is limited by the very acts of the aircraft in question. When used by a State or by a rebel group or other belligerent entity to attack, these aircraft will likely immediately lose their civil status, thereby allowing the use of force against what would have, by its own actions, become a state aircraft. While the use of force against state aircraft may breach other rules of international law in some circumstances, it would not violate Article 3*bis* or any related provision of international law relating to civil aircraft work. The only potential problem with this analysis is when non-State actors are

²²³ *Case Concerning Oil Platforms* (Iran v. U.S.), 2003 I.C.J. Reports, para. 51 [*Oil Platforms Case*]. This case left open the issue of whether the Iranian missile attack on the U.S.-flagged tanker *Sea Isle City* and another U.S.-owned merchant ship, as well as the firing on U.S. military helicopters was grave enough to be an armed attack. It seemed to indicate that it was not, but the decision is too clouded with issues of intent and attribution to determine the court's measure of the gravity of the attack. (*ibid.* at para. 64). The court did provide some guidance when it determined that the mining of a single warship, in this case the *U.S.S. Samuel Roberts*, could in itself be an armed attack. (*ibid.* at para. 72).

²²⁴ This does not mean that persons cannot take actions in self-defense to immediate threats that arise. "[W]arships and combat aircraft, when assaulted by foreign forces on the high seas or in international airspace respectively, do have the right to defend themselves by means of military force."²²⁴ Bruno Simma, ed., *The Charter of the United Nations: A Commentary* 2nd ed. (Oxford: Oxford University Press, 2002) at 797. This is consistent with the judgment in the *Corfu Channel Case* (U.K. v. Albania), [1949] ICJ Reports 4 at 31.

using such aircraft. Do their aircraft become “quasi-state” aircraft?

2. ABDP Shootdowns as Self-Defense

As the legal position that offers the strongest justification for the use of weapons against civil aircraft, one can see that it would be desirous for ABDP countries to classify these operations against drug trafficking as a form of self-defense, thereby not only justifying the use of force against civil aircraft, but also justifying the use of force in general without the consent of other States. While such a desire is understandable, it is not in keeping with the spirit and intent of Article 51 of the UN Charter, even under a broad reading.

One author has found that drug trafficking can indeed be tantamount to an armed attack.²²⁵ In theory, he is correct, as its effects can be the same as those of an armed attack. The corrosive nature of the drug lords’ operations can have devastating impacts on a country. Death, misery, and even the potential downfall of the government are all consequences of drug activities, consequences no less than those that a State would face if it were actually attacked by another State.

Notwithstanding these concerns over the devastating impact of the drug trade, the shootdown of civil aircraft involved in drug trafficking is troubling under a self-defense analysis for several reasons. These reasons have been succinctly laid out:

The International law doctrine of self-defense ... does not provide a particularly good fit for the drug shoot-down problem, for the following reasons:

First, There has been a long-standing controversy about whether the right to use force in self-defense can exist in the absence of an *armed attack*. This argument usually arises in connection with anticipatory or preemptive self-defense, but it clearly has considerable force when the issue is whether force can be used against aircraft that in most cases have

²²⁵ Stokdyk, “Shootdown Policy”, *supra* note 215 at 1308.

not displayed or used armed force, and are not expected to do so.

Second, While the drug problem may pose an extraordinary threat to national security of a country, it will probably be hard to argue that any individual aircraft flight presents the sort of urgent danger that has traditionally been considered necessary to trigger the right to use force in self-defense.

Third, The offenders typically are not members of the armed forces of another nation, or even armed agents as envisioned in the term 'state sponsored terrorism.' While drug traffickers have cozy relationships with the governments of a number of nations, they are not generally operating as proxies for those governments in the execution of national policy. They are criminals, not actors, on the international scene.²²⁶

While the third issue may have been remedied by the post-9/11 approach to non-State actors, the other two remain areas of concern and are potential problems under international law for the use of self-defense as a justification for such shootdowns. The acceptance of such an interpretation would lead to the potential for the acts of any dangerous criminal organization as well as many other acts of low-level violence to be classified as an armed attack. While such a result would probably not be an intended consequence, it would likely happen. As such, while it would be a good defense in some shootdown situations, self-defense is a poor fit when looking for international justification for ABDP shootdowns.

B. Armed Conflict and Article 89 of Chicago Convention

While it is not a circumstance precluding wrongfulness under international law as are the other justifications analyzed in this section, a state of armed conflict would allow for the invocation of more permissible wartime norms, thus relieving States of the strict burdens under international law prohibiting the shootdown of civil aircraft. The state of armed conflict is examined here because it is a natural follow-up to an armed attack and

²²⁶ Johnson, "Shooting Down Drug Traffickers," *supra* note 111 at 89.

is where the law would be expected to go after an attack.

Armed conflict poses serious risks to civil aviation, including commercial aviation. As an example, during the Iran-Iraq war, the Iraqi Air Force shot down an Asseman Airlines Fokker F-27 over Iranian airspace, killing 46 persons.²²⁷ It had a year earlier declared a “prohibited zone” over Iran and had warned of the potential shoot down of commercial aircraft due to the difficulty of distinguishing airliners from “real targets.”²²⁸ In another example, during the Falklands conflict a British pilot was within seconds of shooting down a Brazilian airliner, believing it to be an Argentine Air Force 707 that had been monitoring the British Task Force.²²⁹ While the shootdown never took place, it demonstrates the danger of civilian aircraft operating in proximity to forces in conflict, especially when flying airframes similar, and in some cases identical, to military aircraft.

The Chicago Convention contains a number of obligations relating to civil aviation that are, by their very nature, incompatible with a state of armed conflict. Therefore, the Chicago Convention has provided for States to forgo some or possibly all of their obligations under Chicago if they invoke Article 89 of the Convention.²³⁰ While it is the first area to be examined, it is of limited effect.

²²⁷ See “Iraqi Fighters Shoot Down Iranian Airliner” *Japan Economic Newswire* (21 February 1986), online: LEXIS (News).

²²⁸ See “Iraq Declares Iranian Airspace ‘Prohibited Zone’ ” *United Press International* (17 March 1985), online: LEXIS (News).

²²⁹ See Guy R. Phillips, “Rules of Engagement: A Primer” (1993) 1993 Army Law. 4 at 17-18.

²³⁰ The Vienna Convention on the law of Treaties does not affect a State’s right to avoid treaty obligations in case of armed conflict. *Vienna Convention*, *supra* note 108 art. 73. There is support for a customary norm suspending treaties incompatible with a state of armed conflict. The test has been put forth as follows: If there is no specific language in a treaty as to its effect in a state of armed conflict, we look at “whether the object and purpose of the treaty is or is not compatible with a state of armed hostilities between the parties.” U.S., Department of Defense, Office of the General Counsel, *An Assessment of International Legal Issues in Information Operations* 2nd ed. (1999) at 3 [*DoD IO Assessment*]. This is particularly difficult in multinational treaties.

1. Legal Effect of an Article 89 Declaration

Article 89, entitled "War and emergency conditions" states

In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council.²³¹

As stated before, the invocation of Article 89 and the beginning of a state of armed conflict is not a "circumstance precluding wrongfulness" like the other "defenses" in this section. Rather, it is a means of avoiding certain international obligations, specifically in the case of Article 89, obligations under the Chicago Convention. This may perhaps include the obligation to refrain from the shootdown of civil aircraft. What the practical effect of a declaration under Article 89 would be is not clear. Senator Kerry, in the 1994 debates over the ABDP, stated his belief that an Article 89 would go so far as to relieve a State of all international wrongfulness relating to a shootdown.²³² This may, however, be an overstatement. Such a notice would only have the potential to make the provisions of the Chicago Convention inoperative. It would have no effect on customary international law.

One author has stated that there are three possible implications of an Article 89 declaration:

1. The [Chicago] Convention is inoperative;
2. The whole convention is not inoperative, just the rules governing territorial airspace;
3. The Chicago Convention is subordinated to LOAC [Law of Armed Conflict], making a downing of an aircraft in violation of LOAC a

²³¹ *Chicago Convention*, *supra* note 71 art. 89.

²³² U.S., *Cong. Rec.*, 140 at 8256 (1 July 1994) (Senator John Kerry).

violation of Chicago.²³³

There is a good argument that the invocation of Article 89 does not remove all obligations under the convention.

[T]he existence of a state of armed conflict among certain parties should not be regarded as suspending the belligerents' obligation to carry out their combatant activities with due regard for the safety of civil aviation. Accordingly, Article 89 does not provide much help in deciding what provisions of the Convention will remain applicable during an armed conflict, and resort will still be required to the general principle that only those obligations that are incompatible with a state of armed conflict will be suspended, and only among the belligerents.²³⁴

The most correct interpretation of Article 89 is that once it is invoked during an armed conflict, or even without its invocation, the requirements of the Chicago Convention are supplanted by the laws applicable to armed conflicts. This is consistent with the rule of international law, supported by the ICJ in the *Nuclear Weapons Case*, that the *lex specialis*, in this case the law of armed conflict (LOAC), prevails over more general international obligations.²³⁵ It is therefore the beginning of a state of armed conflict and not Article 89 that is of the most critical importance. LOAC would still prevent the shootdown of "civil aircraft" in most circumstances, but it would loosen the criteria for States wishing to use force against civil aircraft by the application of LOAC targeting requirements.

2. The Invocation of the Law of Armed Conflict

With the start of an armed conflict and the suspension of appropriate obligations under the Chicago Convention and customary international law, there may be a corresponding rise of obligations under LOAC, assuming that the situation rises to the

²³³ See Linnan, "Iran Air Flight 655", *supra* note 66 at 264-66.

²³⁴ DoD IO Assessment, *supra* note 230 at 36.

²³⁵ *Nuclear Weapons Case*, *supra* note 67 para. 25.

level of an international or internal armed conflict under international law.²³⁶ With the initiation of armed conflict, the appropriate body of LOAC becomes operative. This includes the four Geneva Conventions, which are considered reflective of customary international law,²³⁷ the 1977 Protocols, and various other treaties that make up LOAC. An extensive analysis of the provisions is far beyond the scope of this work, but the basic thrust of this body of law can be distilled into four general principles of law that reflect much of the vast body of LOAC that would govern the targeting of aircraft in war. Before examining the four principles, it should be noted that medical aircraft, civilian airliners, and aircraft protected by agreement of the parties may be strictly off-limits for targeting purposes in war.²³⁸

The "principle of distinction," as used in LOAC, requires States to "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives"²³⁹ This would of course include civil aircraft. An attack that is indiscriminate is an illegal attack,²⁴⁰ and indiscriminate attacks are defined as those that:

²³⁶ Different provisions of LOAC apply depending on whether the conflict is an international or an internal armed conflict. In international armed conflicts, the vast majority, and most restrictive of the provisions of LOAC apply. See the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31, the *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85, the *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135, and the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287, *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 15 August 1977, UN Doc. A/32/144 [*Protocol I*]. In an internal armed conflict, only a small part of LOAC applies, most of it reflected by Protocol II to the Geneva Conventions. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 15 August 1977, UN Doc. A/32/144.

²³⁷ *Nuclear Weapons Case*, *supra* note 67 para. 81.

²³⁸ Louise Doswald-Beck, "The San Remo Manual on International Law Applicable to Armed Conflict at Sea" (1995) 89 A.J.I.L. 192 at 206.

²³⁹ *Protocol I*, *supra* note 236 at article 48.

²⁴⁰ See *ibid.* at article 50(4).

- are not directed at a specific military objective;
- employ a method or means of combat which cannot be directed at a specific military objective; or
- employ a method or means of combat, the effects of which cannot be limited as required.²⁴¹

Any attack on civil aviation involving any of the three above prohibitions would be illegal under LOAC.

Under the “principle of necessity,” the selected target must be a military objective, defined as an object that contributes effectively to the military action of the enemy and the destruction, capture, or neutralization of which offers a definite military advantage for the targeting forces.²⁴² If a civil aircraft meets this test, it is a potential target as defined under the laws of war and may be attacked. If it is not, or if there is a doubt as to whether it is a military object, it may not be attacked.²⁴³ In contrast, objects classified as “civilian objects,” including civil aircraft not amounting to a military objective, may not be targeted in armed conflict.

The “principle of proportionality” also applies in the course of an otherwise necessary and discriminate attack, when there is a risk of incidental loss of civilian life or damage to civilian objects, as would be the case in nearly every shootdown of a civil aircraft.

[T]hose who plan or decide upon an attack shall ... refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.²⁴⁴

If it is determined that the attack poses a risk to civilians or to civilian objects, a

²⁴¹ *Ibid.*

²⁴² *Ibid.* at art 52(2).

²⁴³ See *ibid.* at art. 52(3).

²⁴⁴ *Ibid.* at art. 57(2)(a)(iii), 51(5)(b), and 57(2)(b).

balancing test must be done. One must weigh the probability of death or destruction to protected persons or places and the extent of that damage against the military advantage that would be gained. If the planned attack does not pass the test as articulated above, the attack must not be undertaken. Thus, if a civil aircraft carrying civilians was also carrying some military material in its cargo or engaging in some military mission, one must balance the military necessity to be gained from its destruction against the loss of civilian life before using force. This principle would act to prohibit attacks on aircraft carrying civilians in most circumstances, unless the military advantage to be gained is substantial.

That principle is balanced by the principle of chivalry, which forbids dishonorable (treacherous) means, dishonorable expedients, and dishonorable conduct during armed conflict. This principle prohibits perfidy, which involves tricking the enemy by treacherously relying on his adherence to the law of armed conflict in an effort to kill or wound the enemy. It would therefore be unlawful to hide military objectives behind civilian objects, such as civil aircraft.

3. ABDP Shootdowns as Part of an Armed Conflict

The classification of the South American drug trafficking problem as part and parcel of an armed conflict is an inviting theory. Such a characterization would be limited in scope to situations that involve an actual armed conflict under international law. Such a situation probably exists only in Columbia at this time. In fact, the International Committee of the Red Cross recognizes the civil war in Columbia as the only major armed conflict in Latin America.²⁴⁵

²⁴⁵ See International Committee of the Red Cross, *Annual Report 2003* (2004) at 180, online: ICRC, <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_annual_report_2003>.

Viewed as part of an armed conflict, the obligations to enemy civil aircraft that would ordinarily be applicable under international law are supplanted by LOAC. The act of distinguishing between civil and state aircraft would be changed to that of differentiating between military objectives and non-military objectives. Viewing drug traffickers as part of the enemy in an armed conflict requires a factual finding that shows an actual combination of effort between the two. Such a fusion has already been recognized. "The fusion between drug traffickers and illegal armed groups ... makes it ... no longer possible to credibly distinguish between the two."²⁴⁶ President Bush also spoke about these connections in his National Security Strategy, issued in 2002. "In Columbia, we recognize the link between terrorist and extremist groups that challenge the security of the state and drug traffickers' activities that help finance the operations of such groups."²⁴⁷

The link is mostly financial. In the late 1980s, the FARC began to tap into drug activities to gain resources to set up their military operations.²⁴⁸ "Some terrorist groups have been linked to drug smuggling primarily to finance their activities. The profits from even one consignment of narcotics could provide small terror cells with substantial operating capital."²⁴⁹ While it is a factual determination, if a State determines that drug traffickers are part of enemy forces in an armed conflict, they may be shot down without warning as lawful military objectives. The link may indeed go beyond financing. Some evidence exists that FARC soldiers themselves are actively cultivating and transporting

²⁴⁶ U.S., United States Senate, *Trip Report, Senate Foreign Relations Committee, Minority Staff Delegation to Columbia, May 27-31, (2002)* at 1 [2002 Senate Trip Report].

²⁴⁷ U.S., Office of the President of the United States, *National Security Strategy of the United States*, (2002) at 10 [2002 NSS].

²⁴⁸ See RAND Corporation, *Project Air Force, 2001 Annual Report* (2001), online: Rand Corporation, <www.rand.org/publications/AR/AR7068.pdf> at 75.

²⁴⁹ U.S., Office of the President of the United States, *National Security Decision Directive Number 221*, (1986) 2.

drugs, further supporting the analysis that drug flights may be military targets.²⁵⁰

There is precedent for the shootdown of otherwise civil aircraft acting in private support of rebel forces in non-international armed conflicts. For example, in 1983, Nicaragua's pro-Soviet Sandinista Government shot down a DC-3 that was ferrying supplies, including munitions, medical supplies and provisions, to the *Contras*, a rebel force fighting to overthrow the Sandinistas.²⁵¹ In a similar event, Nicaraguan forces shot down a DC-6 operating on a resupply flight from Swan Island in Honduras with a Columbian and Nicaraguan crew.²⁵² There was no international protest resulting from either incident, despite the fact that the flights were not linked to any State, were international in character, and were manned, in some cases, by persons of other than Nicaraguan nationality. In an even more infamous shootdown, Nicaragua shot down a C-123 flying for the U.S. carrier Southern Air Transport that was acting on behalf of what was described as "private benefactors."²⁵³ The flights were later determined to be part of the Iran-Contra Affair and connected to unauthorized actions of U.S. and other nationals; however, the aircraft was civilly registered to Doan Helicopter in the U.S. with the registration number N4410F.²⁵⁴ Again, there was no international outrage over this U.S. registered civil aircraft being shot down. One can certainly conclude that it was seen as a lawful target based on military necessity under a LOAC analysis. The shootdown of these flights stands in support of the proposition that civil aircraft engaging in activities

²⁵⁰ See Frank Main, "Columbia's Killing Fields Claiming Lives in Chicago: Drug Team Hunts Chicago's Heroin Source" *Chicago Sun Times* (6 June 2004) at 24.

²⁵¹ See U.S., Department of State, *Sandinistas Shoot Down a Contra DC-3* (1983), online: Digital National Security Service (Cable from the U.S. Embassy in Managua to the U.S. Secretary of State).

²⁵² See "Survivor from Contra Plane Interrogated, Search for Others", *Associated Press* (25 January 1988), online : LEXIS (news).

²⁵³ U.S., Central Intelligence Agency, *Testimony before the House Permanent Select Committee on Intelligence Regarding to the Crash of a C-123 in Nicaragua* (1986) at 2. The CIA, while once connected to Southern Air Transport, denied involvement. (*ibid.*).

²⁵⁴ See U.S. Federal Aviation Administration, *Fact Sheet on C-123 Shot Down in Nicaragua*.

for a belligerent may be attacked without warning.

These rights extend beyond the combatants. States that are not party to the conflict would have certain rights enabling them to deal with intruding belligerent forces including civil aircraft. Neutral powers have the right and the obligation to prevent the use of their territory by belligerents. One author has speculated that neutral States have broad discretion to shootdown intruding belligerent aircraft, including even civil aircraft.²⁵⁵

However, while seemingly useful in theory, the characterization of drug trafficking as part of an armed conflict is very unlikely, due to the reverberations that would invariably result from such a classification. While it might free up restrictions on Columbian, Peruvian, and other forces in the targeting of rebel aircraft, the corresponding obligations that would arise with the invocation of LOAC would bind the State far too much. A State would not be allowed to “cherry pick” provisions of LOAC and disregard others. As the situation in Columbia is a civil war, if the Columbian forces started treating drug traffickers as part of the belligerent forces for targeting purposes, Protocol II to the Geneva Conventions would then apply to all counter-drug activity in Columbia. The obligations under Protocol II would likely be too restrictive to lead States to classify drug trafficking as a rebel act, and the States involved are not likely to do so out of a desire to operate under their own domestic law as opposed to the international law of armed conflict. While the battle against the FARC and others in Columbia is recognized

²⁵⁵ “En cas de guerre, l’admission d’aéronefs non militaires ou privés est laissée à la discrétion de l’Etat neutre. Si ces aéronefs pénètrent dans la juridiction neutre en violation des mesures prescrites par la Puissance neutre ils seront soumis aux pénalités que la Puissance neutre peut édicter. Par conséquent, les aéronefs civils qui n’obtempèrent pas à l’ordre d’atterrissage, risquent d’être abattus. Dans ce cas-là, l’Etat neutre doit donner un avertissement avant de recourir à la force.” Park, *Souveraineté Aérienne*, *supra* note 96 at 312.

as a non-international armed conflict, the fight against drug traffickers is but a law enforcement action with potential international implications. As such, States' actions against such operations are bound only by human rights law, not LOAC.

C. Distress

On 25 October 1999, a Learjet 25 carrying golfer Payne Stewart and five others lost contact with air traffic controllers and went out of control, flying aimlessly over the central United States. After drifting for several hours and being intercepted several times by Air Force and Air National Guard fighter aircraft, the Learjet ran out of fuel and crashed in rural South Dakota.²⁵⁶ While all six on board perished, no one on the ground was injured or killed.

This was not the first such scenario. In 1988, an errant Learjet flying from Tennessee to Texas was intercepted by Air Force fighters after having overflowed its destination. It subsequently left U.S. airspace where it eventually ran out of fuel and crashed into a mountain in Mexico.²⁵⁷ In a similar event, a Vienna to Hamburg flight lost contact with authorities and went out of control, subsequently being intercepted by RAF fighters over Scotland before it as well ran out of fuel and crashed in the sea 200 miles off the coast of Iceland.²⁵⁸ There was no indication in any of these scenarios that authorities had planned on using force to terminate the flights, as all three crashed in remote, non-populated areas.

But what if the Payne Stewart aircraft had been projected to crash in, for example,

²⁵⁶ See Doug Mills "Crash Mystery; Jet Carrying Payne Stewart Drifted for Hours." *Chicago Sun-Times* (26 October 1999) 1.

²⁵⁷ See "'Learjet Set' Shocked by Crash of Stewart's Plane: Investigators Don't Expect the Site to Reveal too Many Clues as to What Caused the Deaths of the Six on Board" *The Vancouver [British Columbia] Sun* (27 October 1999) A4.

²⁵⁸ See "RAF Chase Over Scotland May Hold Clue to Stewart Death Flight" *The [Newcastle UK] Journal* (29 October 1999) 28.

downtown Omaha or Sioux Falls as opposed to a remote field in South Dakota? Would it be lawful for the military interceptors or the AAA forces of a country to terminate such a flight in order to prevent the death of persons on the ground, even at the cost of the lives of those on board?²⁵⁹ As international law regarding the shootdown of civil aircraft would certainly apply in the European situation, and arguably in the 1988 crash in Mexico, a *de facto* international flight, one must search for a legal justification for breaching the firm rule forbidding the use of armed force against foreign civil aircraft. Such a situation would certainly not qualify as an armed attack under Article 51, even in the most extreme circumstance. Under what authority may a State save lives in a manner that would otherwise violate its international obligations?

1. The Defense of Distress in International Law

International law recognizes that it may be necessary to deviate from accepted international norms in order to save lives. Allowing, or in fact mandating, that human beings perish in order to meet technical compliance with an international obligation would weaken the force and acceptability of international law and would make compliance with it all but politically impossible. The invocation of the defense of distress allows a deviation from international obligations to save live in some circumstances.

The defense of distress has been codified in the Draft Articles on State Responsibility in Article 24.

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving

²⁵⁹ The military has published procedures for the destruction of "derelict" objects, but this does not include aircraft with live persons on board. See U.S., Chairman of the Joint Chiefs of Staff, *CJCSI 3610.01A Aircraft Piracy (Hijacking) and Destruction of Derelict Airborne Objects* (2001).

the author's life or the lives of other persons entrusted to the author's care.²⁶⁰

The Draft Articles go on to say that the defense of necessity does not apply if the “situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or ... [if t]he act in question is likely to create a comparable or greater peril.”²⁶¹

The focus of distress has historically been on vessels such as ships and aircraft.²⁶² Such vessels have violated the territorial/internal waters of coastal States and national airspace when faced with an emergency such as bad weather or mechanical failure. The desire to save the lives of those on board trumps the otherwise unlawful entry. However, this defense applies in other situations, and it has received judicial approval outside of cases involving boundary violations.

Distress as a circumstance precluding international wrongfulness is recognized as a well established rule under customary international law. It was accepted by the tribunal in the *Rainbow Warrior Case* as a lawful reason to not comply with international obligations.²⁶³ The tribunal said it applies when one “acting on behalf of the State knows that if he adopts the conduct required by the international obligation, he, and the persons

²⁶⁰ ILC: “Draft Articles on State Responsibility”, *supra* note 211.

²⁶¹ *Ibid.* art. 24(2).

²⁶² See *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior Affair*, 20 R.I.A.A. 217 at 253 (1990) [*Rainbow Warrior Case*]. The *Rainbow Warrior Case* resulted from the sinking of the *Rainbow Warrior*, while docked in a New Zealand port, by agents of the French Ministry for External Affairs. The agents were convicted in a New Zealand court and were sentenced to 10 years confinement. A subsequent international agreement between France and New Zealand called for them to be confined in French custody on the French island of Hao for not less than 3 years. A year later, the French evacuated one of the agents to France for urgent medical treatment that was not available on Hao. New Zealand claimed that France had breached its international duties under their agreement. See also International Law Commission, *Commentaries to the Draft Articles on Responsibility of States for internationally Wrongful Acts* (2001) at 191 [*State Responsibility Commentaries*].

²⁶³ *Rainbow Warrior Case*, *supra* note 262 at 254-55, see also *State Responsibility Commentaries*, *supra* note 262 at 191.

entrusted to his care, will almost inevitably perish.”²⁶⁴ The defense is not to be liberally applied. In addition, while the focus of distress is on the saving of lives, the tribunal in the *Rainbow Warrior Case* had no trouble extending it to cases involving immediate serious health risks as well.²⁶⁵ It should also be noted that the interest in saving lives as contemplated by this defense is in that which involves an *immediate* threat to human life.²⁶⁶ A speculative or long term threat would not suffice.

2. Distress and the Shootdown of Civil Aircraft

The potential for the use of distress as a defense to the shootdown of a civil aircraft is interesting. If indeed a situation ever presented itself where a foreign civil airliner poses a threat to persons on the ground, for whatever reason (catastrophic mechanical failure, crew incapacitation, deliberate misuse) the defense of distress could be invoked as a justification for destroying the aircraft, even though it would involve killing all on board, before allowing the aircraft to kill persons on the ground, regardless of the reason. This is even more significant in a 9/11-type scenario. There is no need to determine the nationality of an aircraft before shooting it down, nor would there be a need or to engage in some calculation as to whether an attack will be of a certain gravity or will be committed by the right entity in order to invoke self-defense. All that is needed in order to authorize a shootdown on the grounds of the defense of distress is an immediate threat to human life.

It is important to note the balancing of interests requirement contained in the use of distress. “Distress can only preclude wrongfulness where the interests sought to be

²⁶⁴ *Rainbow Warrior Case*, *supra* note 262 at 254.

²⁶⁵ See *State Responsibility Commentaries*, *supra* note 262 at 192.

²⁶⁶ See *ibid.* at 189.

protected ... clearly outweigh the other interests at stake in the circumstances.”²⁶⁷ Thus, the use of this defense would probably not be appropriate to justify the shootdown of an aircraft that is likely to crash far from populated areas, as did the three aircraft in the above examples, nor would it justify the shootdown of an airliner carrying hundreds of persons in order to save the lives of a few on the ground.²⁶⁸ However, when the threat is immediate enough, the defense of distress is more important in this area of law than is even the law of self-defense. States have the right to forgo their international obligations not to shootdown civil aircraft in order to save lives; such a scenario would justify the shootdown of civil aircraft.

The application of distress as a justification for ABDP shootdowns is troublesome. There is no doubt that stopping the flow of drugs saves lives. One U.S. general compared the drug trade to WMDs, noting that drugs were responsible for over 19,000 American deaths annually.²⁶⁹ While the actual defense of distress has not been invoked in any situation to justify ABDP operations, or for that matter, any shootdown at all, the saving of human lives in more general terms has been put forward as a potential justification for the shootdown of drug trafficking aircraft. In an opinion by former Assistant Attorney William Weld, it was argued that the shootdown of civil aircraft could be legal under U.S. law if there was a sufficient connection between the drugs carried by

²⁶⁷ *Ibid.* at 194.

²⁶⁸ One could certainly make an argument that in a situation such as 9/11, the lives of those on board, while not yet terminated, are all but lost and should not factor into the balancing test. In a situation where the aircraft is merely having flight control problems and it is not certain that all on board will be lost, as was the case in the crash of United Flight 232 in Sioux City, Iowa in 1989, then the lives on board should be factored into the analysis.

²⁶⁹ See U.S., House of Representatives, *Posture Statement of General James T. Hill, United States Army, Commander, United States Southern Command Before the 108th Congress house Armed Services Committee* (2003) at 8, online: GlobalSecurity.org, http://www.globalsecurity.org/military/library/congress/2004_hr/040401-hill.pdf [*Posture Statement of General Hill*].

an aircraft and the physical harm that could result from them,²⁷⁰ an argument that could be used to justify the invocation of the defense of distress in response to a claim of the international wrongfulness of an act involving a shootdown.

This close of a connection in the ABDP situation is very questionable. While the defense of distress would be extremely useful in justifying many potential shootdown operations, its use is not appropriate in this circumstance. The saving of lives by the shootdown of an aircraft carrying drugs is quite likely too speculative and long term in nature, thus rendering the defense inoperative for ABDP operations. The identity of those to be saved is completely unknown. While one would not be required to identify specific persons to be saved, in a potential Payne Stewart-line scenario, one can at least identify citizens of a specific area that will potentially be saved from the crash of a derelict aircraft. In a drug trafficking situation, the destination of the drugs cannot even be narrowed down to a particular continent, and it is not certain that these drugs will result in any deaths. As the defense is not to be applied liberally, it would appear to be inapplicable to ABDP operations.

D. State of Necessity

It goes without saying that a State has a vital interest in defending itself from armed attack, a right enshrined in Article 51 of the UN Charter. But what about the protection of other vital interests in situations short of an armed attack? To what extent may a State forego its international obligations, most notably here the obligation not to shootdown civil aircraft, in order to protect its vital interests in situations that do not amount to an armed attack but are certainly severe enough to adversely affect the State?

²⁷⁰ See Stokdyk, "Shootdown Policy", *supra* note 215 at 1299.

The deviation from international norms to safeguard essential State interests may be allowed if it is done in a state of necessity. The doctrine of necessity goes back to Machiavelli²⁷¹ and has been linked with the concept of "self-preservation" and with the authority of a State to take action in situations short of an armed attack.²⁷² This excuse for internationally wrongful conduct fell into disfavor in the 20th Century, as it was linked to the pre-WWI unilateral right to wage war out of necessity. It has since reemerged in a more benign form, becoming, on a case-by-case basis, an excuse for a failure to comply with international obligations.

1. The State of Necessity in International Law

As codified in the Draft Articles on State Responsibility, the requirements for a state of necessity are worded in the negative:

Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.²⁷³

In the *Gabcikovo-Nagymaros Case*, the ICJ took occasion to pass judgment on the

²⁷¹ See John Taylor Murchison, *The Contiguous Air Space Zone in International Law* (Ottawa: Department of National Defence, 1955) at 60 [Murchinson, *Contiguous Air Space Zone*].

²⁷² See Roman Boed, "State of Necessity as a Justification for Internationally Wrongful Conduct" (2000) 3 Yale H.R. & Dev. L.J. 1, 4 [Boed, "State of Necessity"]. "The doctrine of necessity, combined with self-preservation, is favored over the better-known theory of self-defense for the reason that . . . self-defense connotes some positive effort on the part of the State to repel an attack when such attack is either imminent or in being, whereas necessity and self-preservation . . . is that theory that permits a State on those grounds to build up a set of circumstances that would make such an attack impossible and consequently discourage any ambitions of a potential enemy." Murchinson, *Contiguous Air Space Zone*, *supra* note 271 at 58-59. "Under some views of international law, self-defense can only be asserted against the attack of another state, while a necessity analysis governs appropriate responses for attacks on a state by private individuals traditionally referred to as 'armed bands.'" Linnan, "Iran Air Flight 655", *supra* note 66 at 262.

²⁷³ *Draft Articles of State Responsibility*, *supra* note 211 at art. 25.

validity of the defense of necessity as a means of justifying the non-compliance with international obligations, in this case the non-compliance by Hungary of treaty obligations with Slovakia concerning the construction and operation of the Gabčíkovo-Nagymaros system of locks on the Danube River. The ICJ held that the defense of necessity does indeed exist in customary international law.²⁷⁴ The court recognized that by invoking a state of necessity, or presumably any other circumstance precluding wrongfulness, a State implies that, absent a state of necessity, its conduct would be wrongful.²⁷⁵ “[I]n invoking necessity, a State does not assert a right in defense of its violation of another State, but rather asserts that, under the circumstances, international law should excuse its conduct.”²⁷⁶ A State does not argue that the international obligation no longer exists, merely that the violation is excused in that situation. In the *Gabcikovo-Nagymaros Case*, the court denied the application of the defense under the facts of the case, mainly because the imminent peril, the threat to the environment, proffered by Hungary remained uncertain.²⁷⁷

While the *Gabcikovo-Nagymaros Case* has little to do factually with the use of force against civil aircraft, a recent case out of the International Tribunal for the Law of the Sea (ITLOS) does bear some factual resemblance to the issue at hand. In the case of the *M/V “Saiga,”* a St. Vincent-registered ship was attacked by Guinean patrol boats in the outer fringes of the Guinean exclusive economic zone (EEZ), resulting in the wounding of two crewmen, the arrest of the ship, and the detention of crewmembers.²⁷⁸ When St. Vincent sought relief at the ITLOS, Guinea pleaded necessity, justifying its

²⁷⁴ See *Gabcikovo-Nagymaros Case*, *supra* note 202, para. 51.

²⁷⁵ See *ibid.*, para. 48.

²⁷⁶ Boed, “State of Necessity” *supra* note 272 at 7-8.

²⁷⁷ *Gabcikovo-Nagymaros Case*, *supra* note 202 at para 55.

²⁷⁸ *The M/V Saiga*, 38 I.L.M. 1323, 1335 (Int’l Trib. L. Sea 1999) [*Saiga Case*].

need to extend its customs laws into its EEZ to prevent the *Saiga* from “offshore bunkering” (refueling operations conducted from a ship off shore), which it perceived as a threat to its vital interests.²⁷⁹ The court, after recognizing the ICJ’s acceptance of necessity as a circumstance to preclude international wrongfulness, analyzed the Guinean claim under the same criteria used by the ICJ.²⁸⁰ While accepting necessity as a circumstance that could preclude international wrongfulness, the court held that Guinea was not acting under a state of necessity and had no excuse not to comply with UNCLOS. There was no evidence that the “bunkering” by the *Saiga* was placing the essential interests of Guinea in grave and imminent peril.²⁸¹

While it seems fairly certain that the defense of necessity has achieved a large degree of acceptance in customary international law, it has not yet achieved universal acceptance.²⁸² It has been critically observed that the defense of necessity consists of “arbitrary awards and bits of state practice stitched together” that seem “dated, ambiguous, or otherwise not completely compelling” to some.²⁸³ In the 1980s, its validity was questioned by the tribunal in the *Rainbow Warrior Case*.²⁸⁴ Additionally, some States have expressed reservations about the use of necessity.

[The UK views] with extreme circumspection the introduction of a right to depart from international obligations in circumstances where the State has judged it necessary to do so in order to protect an interest that it deems ‘essential’. A defence of necessity would be open to very serious abuse across the whole range of international relations. There is a grave risk that

²⁷⁹ See *ibid.*

²⁸⁰ See *ibid.* at 1352.

²⁸¹ *Ibid.* at 1335.

²⁸² Daniel Bodansky & John R. Clark, “The ILC’s State Responsibility Articles” (2002) 96 A.J.I.L. 773 at 788.

²⁸³ *Ibid.*

²⁸⁴ *Supra* note 262 at 254.

the provision would weaken the rule of law.²⁸⁵

These concerns are noteworthy, and with the acceptance of necessity as a lawful defense, States of the world would be wise to limit its application to cases where the threat to a State's interests strictly meets the criteria. The scope of necessity could certainly be used by States to justify actions that are legally dubious.

2. Elements of Necessity

Mindful of the danger posed by the potential use of necessity, the burden is placed on the State claiming such a circumstance to make out the appropriate elements. It is helpful to examine each requirement for the invocation of the defense of necessity more closely to see if the shootdown of civil aircraft can ever be justified under a claim of necessity.

The first requirement is that the deviation from international standards must be the only way to protect an essential interest. "It has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency and ensuring the safety of a civilian population."²⁸⁶ It has been invoked in situations to justify what would otherwise be serious violations of international law.

The defense has been invoked in several instances to justify the use of force against another State in the post-Charter era. Belgium used the defense to justify its 1960 intervention in the Congo, as well as in the Coalition intervention in post-war Northern

²⁸⁵ Foreign and Commonwealth Office, *Draft Articles on State Responsibility Comments by the United Kingdom Government*, para. 91, (1998), online: University of Cambridge Faculty of Law <<http://www.law.cam.ac.uk/rcil/ILCSR.UK.rtf>>.

²⁸⁶ *State Responsibility Commentaries*, *supra* note 262 at 202.

Iraq to protect the Kurds in 1991.²⁸⁷ More recently, Belgium invoked the defense to justify the use of force against Kosovo as part of Operation Allied Force in 1999 to protect Kosovar Albanians from Genocide.²⁸⁸ It has also been determined to be appropriate for use in several more minor uses of armed force. For example, the British bombed an abandoned Liberian-flagged vessel, the *Torrey Canyon*, outside British waters to prevent the spilling of oil.²⁸⁹ In another case involving the use of force against a ship at sea, the French Navy sank the *Ammersee*, a civilian cargo vessel that was 25 miles off the French coast, after the ship, loaded with 200 tons of dynamite, caught fire in a storm and was abandoned by the crew. When the owners sought compensation in a French court, the court held that there had been no violation of international law because of the "grave and imminent danger" posed by the ship, and of the fact that "no other measure would have been sufficient to remove the danger."²⁹⁰ Almost anything that is "self-destructive" to the State can be held to be an essential interest. Additionally, Tanzania, Jordan and Macedonia have all eschewed obligations under the Refugee Convention by closing their borders to would-be refugees under a state of necessity defense in order to protect their countries from the devastating effect of the massive influx of refugees.²⁹¹ It has also been used to justify the assumption of jurisdiction over persons of other States in circumstances involved a threat to the security of the State, such as counterfeiting

²⁸⁷ See Andreas Laursen, "The Use of Force and (the State of) Necessity" (2004) 37 Vand. J. Transnat'l L. 485 at 514-15 [Laursen, "State of Necessity"].

²⁸⁸ See *ibid.* at 514-518. Under a recent ICJ decision, it is questionable whether the claim of essential interests could ever be used, in the absence of an armed attack, to justify a violation of Article 2(4) of the UN Charter. See *Oil Platforms Case*, *supra* note 223 at para. 40.

²⁸⁹ See *State Responsibility Commentaries*, *supra* note 262 at 199.

²⁹⁰ See Laursen, "State of Necessity" *supra* note 287 at 495-96, quoting *Nochfolger Navigation Company Ltd. And Others*, 89 Int'l L. Rep. 3 at 3-5 (1987).

²⁹¹ See Boed, "State of Necessity", *supra* note 272 at 2.

currency and plotting against the rulers.²⁹² One can also foresee yet to be employed threats that may allow a State to invoke a claim of necessity in order to eschew international obligations in the future. One author has suggested the “real and imminent threat of deployment of WMD” as a potential interest falling under necessity.²⁹³

While an essential interest must be of an “exceptional nature,”²⁹⁴ it need not be linked with the very survival of the State.²⁹⁵ It can involve lesser interests, as determined by the circumstances of the case. Interests at the lesser end of the spectrum have included the protection of the fur seal population, which led the Russians to unilaterally halt fur sealing on the high seas.²⁹⁶ Canada used it in a similar situation to prevent the extinction of fish off the Grand Banks, even boarding a Spanish fishing ship on the high seas to enforce the ban.²⁹⁷ Of course these lesser interests would not justify the avoidance of every international obligation, especially certain critical ones. As will be seen in the last requirement, the essential interest must be subject to a balancing test in relation to the obligation that is breached.

Not only must the State be protecting an essential interest, but the danger posed to that interest must be a grave and imminent peril. There are no specifics as to what “grave and imminent peril” means. “The peril has to be objectively established and not merely apprehended as possible.”²⁹⁸ This does not mean that the actual consequence must be at

²⁹² Laursen, “State of Necessity”, *supra* note 287 at 522.

²⁹³ *Ibid.* 524.

²⁹⁴ Boed, “State of Necessity”, *supra* note 272 at 15.

²⁹⁵ See *Gabcikovo-Nagymaros Case*, *supra* note 202 at para 53. “Although a link between preservation of a State’s very existence and the plea of necessity as an excuse for noncompliance with an international obligation of the State has been intimated in several cases, the predominant trend . . . is to expand the notion of necessity to cover ‘essential interests’ other than threats to a State’s very existence.” Boed, “State of Necessity” *supra* note 272 at 10.

²⁹⁶ See *State Responsibility Commentaries*, *supra* note 262 at 197.

²⁹⁷ See *ibid.* at 200.

²⁹⁸ *Ibid.* at 202.

the imminent doorstep of a State. As the ICJ put it in the *Gabcikovo-Nagymaros Case*:

The word "peril" certainly evokes the idea of "risk"; that is precisely what distinguishes "peril" from material damage. But a state of necessity could not exist without a "peril" duly established at the relevant point in time; the mere apprehension of a possible "peril" could not suffice in that respect. It could moreover hardly be otherwise, when the "peril" constituting the state of necessity has at the same time to be "grave and imminent". "Imminence is synonymous with "immediacy" or "proximity" and goes far beyond the concept of "possibility" [T]he "extremely grave and imminent" peril must "have been a threat to the interest at the actual time" That does not exclude, in the view of the Court, that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.²⁹⁹

This test put forth by the court seems to allow for some degree of preemption on the part of the State in invoking necessity. However, the threat must be identifiable, even if remote in time.

As a final element in the invocation of the defense, the breach of the international obligation must not involve an impairment of the essential interests of other States or the international community as a whole. This element creates a balancing test under which the interest sought to be protected "must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests"³⁰⁰ While it is up to the State making out the defense to establish that the balancing test weighs in its favor, it must be noted that the ICJ has recognized that the individual State putting forth the defense is not to be the sole judge of whether the element has been met.

3. The Shootdown of Civil Aircraft in a State of Necessity

The idea of using a state of necessity defense to justify the shootdown of drug

²⁹⁹ *Gabcikovo-Nagymaros Case*, *supra* note 202 at para 54.

³⁰⁰ *State Responsibility Commentaries*, *supra* note 262 at 204.

trafficking aircraft in South America has not been advanced before, but the basic idea behind it is not new. During the debates on the 1994 ABDP immunity amendment, Senator Sam Nunn stated that there was to be found in international law a “national security” exception that would justify the shootdowns.³⁰¹ The protection of national security would seem to be the precise type of essential interest that a State could protect from a grave and imminent peril, as envisioned under the defense. The use of necessity could very well be applicable as a justification for ABDP-style shootdown operations under certain circumstances.

It has been observed that “Rome succumbed [partially] to ... a death of a thousand cuts from various barbarian groups.”³⁰² Such is the situation in Columbia and Peru with the drug traffickers. While each cut inflicted by these groups might not be, in and of itself, enough to justify self-defense under Article 51, the cumulative effect has disastrous implications for the State. The defense of necessity operates to allow States the right to protect their essential interests without requiring that the underlying international obligation to be violated be rendered null and void. While some would argue that such an invocation of necessity would weaken the international system, it could, in reality, strengthen it, serving as a natural pressure release for States when they cannot comply with international obligations because of great risk to themselves, yet have no desire to do away with the entire legal framework. It is therefore necessary to apply the elements of necessity to the facts of ABDP shootdowns to determine if this defense is available in these cases.

³⁰¹ See U.S., *Cong. Rec.*, vol. 140, at S8222 (1 July 1994).

³⁰² Joseph Nye, “The New Rome Meets the New Barbarians” *The Economist* (23 March 2002) 23 at 25.

a. ABDP Shootdowns as the Only Way to Protect Essential Interests from a Grave and Imminent Peril

First and foremost, we must determine whether there is an essential interest that is threatened by a grave and imminent peril. The protection of internal order and security can be an essential interest protected under a claim of necessity, and the maintenance of internal security is certainly one interest that is threatened by the activities of the drug trade. Evidence of this fact is abundant. Simply put, drugs are the mother's milk of terrorism and insurgency in South America. All insurgent groups in Columbia depend on drugs,³⁰³ and Colombian drug lords have what has been characterized as a "stranglehold on the power of Columbia's government."³⁰⁴ The drug trade finances corruption and lawlessness in numerous remote growing regions.³⁰⁵

These threats spread beyond Columbia into the whole Andean Region. "The narcoterrorist organizations operating primarily out of Columbia are spreading their reach throughout the region, wreaking havoc, and destabilizing legitimate governments."³⁰⁶ One example is Peru. The Anti-Peruvian SL is supported by drug operations.³⁰⁷ Despite being beaten back during President Fujimori's rule, the SL has recently reemerged, mainly due to the funding provided by the drug trade.³⁰⁸ The threat to these States' essential interest of maintaining internal order posed by drug trafficking goes beyond drugs. The air bridge used by drug trafficking aircraft is the same as that used by

³⁰³ See U.S., Department of State, *International Narcotics Control Strategy Report* (2002) at II-3, online: State Department, http://www.state.gov/g/inl/rls/nrcrpt/2002/pdf/INCSP_2002.

³⁰⁴ CarrieLyn Donigan Guymon, "International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention" (2000), 18 Berkeley J. Int'l L. 53 at 59 [Guymon, "Transnational Organized Crime"].

³⁰⁵ See *Deterrence Effects*, *supra* note 7 at 5.

³⁰⁶ *Posture Statement of General Hill*, *supra* note 269 at 5-6.

³⁰⁷ See *Deterrence Effects*, *supra* note 7 at II-7.

³⁰⁸ See *Posture Statement of General Hill*, *supra* note 269 at 8. Before its first demise, the SL used drugs to finance a war that killed 30,000 people. See *INCSP 2002*, *supra* note 303 at II-4.

weapons traffickers, whose actions stoke the fires of civil war.³⁰⁹ In addition, the suppliers of drugs threaten the populations of these countries through crimes such as kidnappings, murder and other illicit activities throughout South America.³¹⁰ Much of the drug trafficking in South America is linked to international terrorism, including Islamic terrorists in South America's tri-border region.³¹¹ Other countries feel the effects as well. Caribbean governments have compared the drug problem to that of military repression.³¹²

Beyond national security issues, damage to the environment is also a notable consequence of drug trafficking activities. "Narcotraffickers are by far the biggest source of environmental damage in Columbia."³¹³ In their attacks on oil pipelines, drug-fueled terrorists have spilled oil in amounts reaching 12 times that spilled by the Exxon Valdez,³¹⁴ and they are responsible for 2.4 million hectares of rain forest destruction.³¹⁵

Simply put, the effects of drug trafficking on the States of this region are an attack on the legitimate sovereign governments themselves.³¹⁶ The cumulative effect of the damage being done by drug traffickers appears to be the exact type of situation that requires a State to deviate from international law in order to protect its essential interests. The threat posed by drug trafficking goes far beyond the ICJ's requirements regarding the establishment of the threat. The threat to the national security of these countries is real

³⁰⁹ See *Posture Statement of General Hill*, *supra* note 269 at 9, Columbia, *The Effectiveness of the Colombian Democratic Security and Defense Policy Aug 02 – Dec 03*, (2003) at 7, online: Colombian Ministry of Defense, <http://www.mindefensa.gov.co/politica/documentos/effectiveness_cdsdp_upto_200312_eng.pdf>.

³¹⁰ See *Posture Statement of General Hill*, *supra* note 269 at 7.

³¹¹ See Hale E. Sheppard, "U.S. Actions to Freeze Assets of Terrorism: Manifest and Latent Implications for Latin America" (2002) 17 *Am. U. Int'l L. Rev.* 625 at 630-31 [Sheppard, "Actions to Freeze Assets of Terrorism"].

³¹² See Canty, "Coast Guard Use of Force", *supra* note 206 at 3631.

³¹³ 2002 *Senate Trip Report*, *supra* note 246 at 3.

³¹⁴ See *Posture Statement of General Hill*, *supra* note 269 at 8.

³¹⁵ See 2002 *Senate Trip Report*, *supra* note 246 at 3.

³¹⁶ See Guymon, "Transnational Organized Crime", *supra* note 304 at 64.

and present, and the legitimate governments in this region are under assault.

While a strong case can be made that drug trafficking is, across the board, a grave and imminent peril to the essential interests in maintaining internal security of these South American countries, a much more limited case can be made that the shootdown of trafficking aircraft is the *only* way to protect that interest. As was noted by an American Coast Guard officer, deadly force is rarely required in the interdiction of drug traffickers.³¹⁷ Lesser means usually suffice.

First, we can establish that the shootdown of civil aircraft trafficking in drugs is certainly one way to put a halt to drug trafficking activities and to protect the vital interests of a State.

Illegal flights by general aviation aircraft are the lifeline of the traffickers operations. They move narcotics and related contraband, such as chemicals, currency, and weapons ... as they ferry logistical supplies to production sites and staging areas.³¹⁸

Shootdown operations are closely followed by traffickers, and these operations have a dramatic effect on their actions. Even a short stand down in the ABDP in November 1995 caused an immediate increase in drug flights.³¹⁹ But while shootdowns are one way to halt the drug trade, are they, as is required under the defense of necessity, the only way?³²⁰

³¹⁷ See Michael T. Cunningham, "The Military's Involvement in Law Enforcement: The Threat is Not What You Think" (2003) 26 *Seattle U.L. Rev.* 699 at 715.

³¹⁸ *Presidential Justification Memo*, *supra* note 33 at 1.

³¹⁹ See *Deterrence Effects*, *supra* note 7 at IV-44.

³²⁰ An example of using lesser means than using force against an aircraft is seen in the French response to the use of aircraft in a string of jailbreaks. To thwart attempted breakouts using helicopters, the French officials simply installed mesh coverings over jails where the most dangerous prisoners were held. See "France Announces Measures to Prevent Prison Escapes" *Associated Press Worldstream* (18 October 2001), online: LEXIS (News). This plan ultimately met failure as criminals began cutting through the meshing and a second string of prison escapes was soon underway. See "Chopper Key to Jailbreak" [*Melbourne*] *Nationwide News Pty Limited, MX* (15 April 2003) 8.

There are lesser available means of dealing with drug traffickers other than the resort to using weapons against aircraft in flight. One of these includes forcing the aircraft to land, although this is dependent on the pilot's willingness to comply. Another option could be the use of specially trained counter-drug forces to conduct raids at their points of embarkation and arrival. In Mexico, with the use of U.S.-provided helicopters, such assault forces do indeed conduct raids on suspected drug trafficking bases, and Mexico conducts no shootdown operations.³²¹ However, such lesser means have not proven effective in Columbia and Peru. "With enough time and resources, there are risks that traffickers will find ways around static blockades or the initial tactical plans being executed."³²² In addition to the ability of the traffickers to find ways around the lesser means, the lack of effective control over territory is a major factor that hampers the use of lesser means of controlling drug flights.

[T]he Government of Peru lacks the resources to control all of its airspace and to respond when trafficker aircraft land at remote locations outside the effective control of the government. Accordingly, drug smuggling aircraft flagrantly defy Peru's sovereignty, penetrating its borders at will and flying freely through the country.³²³

Likewise, there are areas in Columbia over which the Columbian government has very little control.³²⁴ In South America, Coca production purposefully clusters in areas that have poor infrastructure with the intention of avoiding governmental authorities.³²⁵ This lack of control over certain critical territory that is closely linked with the drug lords is the key point as to why shootdown operations may indeed be the only way to stop the

³²¹ See U.S., General Accounting Office, *Revised Drug Interdiction Approach is Needed in Mexico*, (GAO/NSIAD-93-152) (1993) at 19.

³²² *Deterrence Effects*, *supra* note 7 at 49.

³²³ Presidential Justification Memo, *supra* note 33 at 1.

³²⁴ See *INCSP 2002*, *supra* note 303 at II-4.

³²⁵ See *Deterrence Effects*, *supra* note 7 at ES-2.

flow of drugs out of these countries. Raids are almost out of the question. The drug traffickers can land and off-load their drug cargo in 10 minutes.³²⁶ Even if raids were logistically possible, it would be suicide for a government to send small raiding parties into rebel-controlled areas to attack a clandestine airfield or production site.

The unique facts of the drug trade in South America make for a strong argument that the use of shootdown operations is indeed the only way for governmental forces to control the effects of the drug trade. However, as the facts are unique to this area, this analysis should not be extended to other areas in the world in which drugs are a problem without a close examination of the facts to determine whether the shootdown of aircraft is the only way to deal with the problem.

b. ABDP Shootdowns as an Impairment of the Essential Interests of Others

In the balancing of interests, the available facts seem to weigh in favor of allowing countries to engage in shootdown operations under a claim of necessity, at least as far the Andean example shows. In this situation, the obvious interest of both individual States and the world as a whole is the safety of international civil aviation. The implementation of a "free-fire zone" over Columbia or Peru would threaten international civil aviation to such a degree that other States would find it intolerable, regardless of the threat posed to these countries by drug trafficking. The degree to which Columbia and Peru can control the threat to the safety of international civil aviation will determine the amount of support that their policies receive from other States.

The threat to international civil aviation comes when countries engaging in shootdown operations are unable to adequately protect all international flights from being

³²⁶ See "Columbia Angered by U.S. Action; End of Data-Sharing Seen as harming Drug War" *Dallas Morning News* (28 May 1994) 1A.

accidentally shot down. In addition to the steps that are needed to ensure the proper identification of target aircraft in order to keep the operation in compliance with human rights norms, several steps can be taken to ensure that other States are aware of the threat and can take action to protect their flights that might enter countries engaged in ABDP shootdowns. First, as is already a part of ABDP operations, countries engaging in a shootdown campaign should limit the operations to specific zones of high drug trafficking activity, as opposed to extending them to the entire country. For example, not every foreign flight in Peru is under the threat of shootdown as soon as it crosses the boarder into Peru. Only aircraft flying in a specifically designated and publicly declared Air Defense Identification Zone (ADIZ) without a flight plan are targeted.³²⁷ Countries could also issue notices to airmen (NOTAMs) or use an Article 89 declaration to properly warn foreigners that such an operation is underway and that all foreign aircraft should stay clear or be prepared to engage in specifically issued governmental directives to avoid being targeted. States should also be sure to limit shootdown operations to general aviation type aircraft. Larger aircraft, such as 727s, have been used to ferry drugs;³²⁸ however, such larger aircraft, with their need for longer runways and more ground equipment, are more easily tracked to a known ground destination, making shootdown operations less necessary. As most foreign aircraft will be larger commercial-style aircraft and not general aviation, this will help prevent the accidental shootdown of a foreign civil aircraft. The shootdown of commercial aircraft would likely never meet the balancing test required under necessity and any shootdown of such an aircraft would

³²⁷ See *State Department Peru report*, *supra* note 7.

³²⁸ See "Coast Guard and Maritime Transportation Drugs and Addiction", *Federal Document Clearing House* (August 1995), online, LEXIS (News) (Lee P. Brown, Director ONDCP, Testimony before House Committee on Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation).

almost certainly have to rely on self-defense or distress in times of peace.

Strangely enough, the shutdown of drug trafficking aircraft might even make civil air transportation safer. The main goal of the whole program is not to shoot down aircraft, but rather to make sure that the aircraft do not fly at all.³²⁹ These shutdown operations have proven to cause drug traffickers to move to truck and boat transport, thus keeping drug trafficking aircraft out of the sky. Keeping unmarked, unregistered, and uninspected aircraft, along with their potentially unlicensed and untrained pilots, out of the sky can only make aviation safer. A large number of shutdowns would not be needed to achieve this goal. It has been noted that “[d]eterrence amplifies the effect of a modest number of interdictions by discouraging the great majority of air trafficker pilots from flying; thus, a relatively low level of air interdiction can virtually deny traffickers this essential mode of transport.”³³⁰ Studies have shown that a 3% interdiction rate will deter 80% of all traffic.³³¹

The shutdown of civil aircraft, while potentially being a threat to international civil aviation, can also be seen as an attempt by these countries to fulfill their international duties. If a State has knowledge that its territory is being used for acts that are hostile to other countries, international law requires that the State take some action to put a stop to such acts.³³² The drug trafficking emanating from the Andean Region is certainly a threat, not only to those countries but also the United States. Over a decade ago, the White House realized that “the operation of internationally criminal

³²⁹ See *Deterrence Effects*, *supra* note 7 at 17.

³³⁰ *Ibid.* at ES-3.

³³¹ See *ibid.* at 20. In the same study, interviews with trafficker pilots who had been caught revealed that a 10% chance of being caught would deter almost all of them from flying. (*ibid.* at 21).

³³² See Justin S. C. Mellor, “Missing the Boat: The Legal and Practical Problems of the Prevention of Maritime Terrorism”, (2002) 18 Am. U. Int’l L. Rev 341 at 373. This is supported by the ICJ as well as other tribunals. See *Corfu Channel Case*, *supra* note 224 at 22; *Trial Smelter Case* (U.S. v. Canada), 3 R.I.A.A. 1911 (1941).

narcotics syndicates is a national security threat requiring an extraordinary and coordinated response by civilian and military agencies”³³³ Even a small number of flights can have a huge impact. Sixty flights a month can carry 80% of the coca needed to supply the U.S.³³⁴ This is also a problem that effects the world. There have been a number of UN and ICAO initiatives to stop the flow of drugs by air.³³⁵ Thus, these shutdown operations, while protecting the host States, are also protecting the rest of the world from the adverse effects of the flow of drugs out of these countries. This is another factor that helps to place the balance of interests in favor of a limited shutdown operation in South America under a necessity analysis, and that provides a potential legal justification for ABDP shutdowns using a necessity defense.

V. Some Concluding Thoughts on ABDP Shutdowns

A. Avoiding Human Rights Concerns

The conclusion that the defense of necessity would perhaps excuse potential violations of international law resulting from shutdowns conducted under ABDP-type operations does not mean that the human rights requirements are necessarily in compliance. Close watch must be kept on all such operations to ensure that the right to life is not arbitrarily taken from anyone, innocent or guilty.

This will require the on-going monitoring of several requirements. First of all, as we have seen above, the use of deadly force to prevent crime is limited to the prevention of “serious crimes.” While one can certainly make the argument that the crime of drug trafficking in this region is serious, a 2001 investigation concluded that “illegal drug

³³³ U.S., *Statement by the White House Press Secretary*, November 3, 1999, online, Federation of American Scientists <<http://www.fas.org/irp/offdocs/pdd14.htm>>.

³³⁴ See *Deterrence Effects*, *supra* note 7 at ES-2.

³³⁵ See generally, R.I.R. Abeyratne, “International Initiatives at Controlling the Illicit Transportation of Narcotic Drugs by Air”, (1997) 63 J. Air L. & Com. 289.

trafficking is not nearly the threat to Peru that it was in 1994³³⁶ When ABDP shootdowns are no longer needed because the threat is no longer serious, such operations should be immediately discontinued in favor of lesser options.

Additionally, to ensure compliance with human rights law, there must be continued efforts to correctly identify suspect aircraft to the exclusion of innocent aircraft that might stray into restricted areas or forget to file a flight plan. This was certainly a factor in 2001 shootdown of OB-1408, which was identified as a suspect aircraft even though it did not fit the established patterns of trafficker activity.³³⁷ To make matters worse, in pre-OB-1408 shootdown operations, no training scenarios were in place in which the intercepted aircraft was not a drug trafficking aircraft.³³⁸ Such policies place innocent life at unreasonable risk.

Additionally, as we have seen under human rights law, when engaging in lethal targeting, most illegality is found when the method "seems to obstruct the possibility of reporting to an available judicial process"³³⁹ Procedures for shootdowns must incorporate some means to afford the pilot an opportunity to land and face justice. This was completely lacking in the shootdown of OB-1408. By the time of the 2001

³³⁶ *Senate Peru Report*, *supra* note 10 at 17.

³³⁷ A similar example of such "outcome-based targeting" can be found in a CIA operation conducted in Afghanistan. Three men were targeted by a Predator drone because one was noticeably taller than the other two, leading officials to believe that it was Osama bin Ladin. They were in fact only local villagers, and all three were killed in the strike. See Klug, "Civil Liberties", *supra* note 69 at 377-78. While one can make a good argument that this was legal targeting done under LOAC, human rights law, applicable in a time of peace, would require better identification in such a factual situation just as it would have in the OB-1408 shootdown.

³³⁸ See *Senate Peru Report*, *supra* note 10 at 17. This contrasts starkly with current U.S. training procedures for the shootdown of civil aircraft. Mock shootdowns are conducted 3-4 times a week, both with intercepts and AAA. Shooters are continually quizzed on ROE and order authentication. The commander of United States Northern Command has speculated that the training may make them "trigger hesitant" rather than "trigger happy." See Eric Rosenberg "Crews Train to Down Hijacked Airlines" *The Houston Chronicle* (3 October 2003) 4.

³³⁹ Orna Ben-Naftali & Keren R. Michaeli, " 'We Must Not Make a Scarecrow of the Law': A Legal Analysis of the Israeli Policy of Targeted Killings" (2003) 36 *Cornell Int'l L.J.* 233 at 286.

shootdown, ICAO Standards that would certainly have provided that opportunity had eroded.³⁴⁰ It is important that military forces use some form of communication that will enable contact with general aviation pilots. As we saw in the OB-1408 tragedy, there was limited communication by radio, and the stall speed of the A-37 fighters was such that they could not slow down enough in order to properly signal the suspect aircraft, even with tracer fire. This problem has been noted by the U.S. and procedures have been implemented. The U.S. went from using fighter jets in interceptions after 9/11 to, in some cases, using a helicopter/fighter duo. The helicopter was found to be better suited for intercepting slow moving general aviation, while the fighters were allowed to be ready for a possible shootdown situation.³⁴¹ Similar modifications to the ABDP should be examined as a means of ensuring contact with slower moving general aviation aircraft.

While ABDP shootdown plans seem to be generally in compliance with human rights, every effort must be made to ensure that the planned operations are implemented. It is easy for those engaging in interceptions on a routine basis to allow standards to loosen over time. It is the responsibility of national leaders to ensure that compliance with human rights laws is continued.

B. The Expansion of Shootdown Operations Based on an ABDP Model

In using State security as an excuse for the shootdown of civil aircraft under international law we must not be too hasty to lower the bar for all shootdown operations. International law does not evolve in a vacuum, and other States are likely to see the ABDP as an opportunity to loosen the legal requirements as well if they too desire to

³⁴⁰ See *Senate Peru Report*, *supra* note 10 at 18, 27.

³⁴¹ See David Rennie "Fortress America is Celebrating with Security", *The [London] Daily Telegraph* (1 January 04), online: LEXIS (News).

shoot down civil aircraft, for whatever reason. This warning was sounded in the U.S.

Senate in 1994:

[B]y creating a national security exception to the international prohibition on the use of force against civil aircraft, the United States will open the door for other countries to do the same. We should not forget that in 1983 the Soviets justified the shooting down of Korean Airlines Flight 007 on national security grounds³⁴²

The expansion of ABDP-style operations can take two forms. One would be to begin the shootdown of drug trafficking aircraft in other parts of the world, outside the Andean Region, as drugs are also a national security threat in other parts of the world. For example, heroin has financed the Taliban,³⁴³ and terrorists in Asia.³⁴⁴ Even the organization that could be said to be the greatest threat to the free world, al-Qaeda, has used heroin to finance its operations.³⁴⁵ "As experts explain, the money to fund terrorists comes mostly from drugs, including heroin in Afghanistan and Southeast Asia, as well as cocaine in Latin America."³⁴⁶ Many of these terrorist organizations are large enough to control some territory. This has possible implications in the war on terror; because the President of the United States has said that America places a priority on disrupting terrorist financing, any of these areas could see an implementation of an ABDP-style operation.³⁴⁷

In a second morphing of ABDP-style operations, shootdown operations could start targeting aircraft carrying other contraband that is seen as a threat to national security. For example, diamonds serve the same function as drugs in some areas, fueling

³⁴² U.S., *Cong. Rec.* 140 at 12785 (12 Sep 94) (Sen. Kassebaum).

³⁴³ See *INCSP 2002*, *supra* note 303 at II-3.

³⁴⁴ See U.S., General Accounting Office, *Terrorist Financing: U.S. Agencies Should Systemically Assess Terrorists' Use of Alternate Financing Mechanisms*, (GAO-04-163) (2003) at 11.

³⁴⁵ See *ibid.*

³⁴⁶ Sheppard, "Actions to Freeze Assets of Terrorism", *supra* note 311 at 627.

³⁴⁷ See *2002 NSS*, *supra* note 247 at 5.

conflicts and funding belligerents in such African countries as Sierra Leone and Angola,³⁴⁸ and they have also been reported to have financed al-Qaeda.³⁴⁹ Could a similar plan be implemented against diamond trafficking aircraft?

Another good example is weapons. Secretary of Defense Rumsfeld has already indicated a belief that the ABDP will include weapons as well as drugs,³⁵⁰ but it could be more serious than just small arms. The U.S. has examined the possibility of conducting interdiction operations to stop WMD, which could include some form of aerial blockade in certain places.³⁵¹ In fact, the Bush Administration recently announced the creation of the Proliferation Security Initiative (PSI). The PSI is a multilateral effort to interdict WMDs through the search of ships and planes that might contain illegal weapons and missile technologies.³⁵² One of the actions to which PSI States have committed is to “require suspicious aircraft in their airspace to land for inspection.”³⁵³ If such a landing cannot be compelled, is the destruction of the aircraft in flight on the table?

While we can see that the international support of ABDP shootdowns may result in the potential spread of shootdown operations to other areas, we must in each instance remember to apply international law as put forth here to the analysis. Some might meet the criteria and be permissible, and some might not. For example, while drugs might be a serious problem in other parts of the world, those places might offer better access to ground interdiction than do Columbia and Peru, thus allowing for other possibilities,

³⁴⁸ See U.S., Congressional Research Service, *Diamonds and Conflict: Background, Policy, and Legislation*, (2003) at 2.

³⁴⁹ See *Ibid.* at 7.

³⁵⁰ “We understand these interdiction flights would not only fight drugs but also will be extended to illegal weapons.” “Rumsfeld-Ramirez News Conference”, *supra* note 205.

³⁵¹ See U.S., Congressional Research Service, *Weapons of Mass Destruction Counterproliferation: Legal Issues for Ships and Aircraft*, (2003) at 25.

³⁵² See Sean D. Murphy, ed., “Contemporary Practice of the United States Relating to International Law”, 98 A.J.I.L. 355.

³⁵³ *Ibid.*

short of the shutdown of civil aircraft. One must circumvent the analysis and declare planned operations illegal merely because the shutdown of civil aircraft is involved, or declare similar operations legal simply because the shutdown of civil aircraft is permissible in ABDP operations. Each situation must be evaluated in terms of the facts at hand.

C. The Montreal Convention and Domestic Law

A hidden danger for ABDP operations is found at the intersection of international and domestic law. The Montreal Convention was drafted to create what would amount to universal jurisdiction over persons engaging in a number of unlawful acts involving civil aviation, including the destruction of aircraft. While the treaty creates no new laws, it obligates States to enact a domestic system that will allow for jurisdiction over persons guilty of such offenses, wherever committed, and enact a "prosecute or extradite" policy. This was implemented in U.S. law as the Air Sabotage Act of 1984,³⁵⁴ enacted partly in response to the KAL 007 shutdown.

While international law lacks teeth, especially when dealing with individual perpetrators, domestic law does not. Domestic law was recently applied in a shutdown case. In August 2003, Brigadier General Ruben Martinez Puente, the head of Cuba's Air Force, and two MiG-29 pilots were indicted in a U.S. District Court on charges of murder, conspiracy, and destruction of aircraft.³⁵⁵ Many wanted Castro indicted as well. The use of domestic law against perpetrators of aerial incidents is not new.³⁵⁶

³⁵⁴ See Marian Nash Leich, "Four Bills Proposed By President Reagan to Counter Terrorism", (1984), 78 A.J.I.L. 915 at 920.

³⁵⁵ See "Cuban Airmen Indicted on Charges of murder, conspiracy, and destruction of aircraft.", *The Washington Post*, (22 August 2003) A03. See also, *FBI Statement on BTTR Indictments*, *supra*, note 156.

³⁵⁶ Some years ago, China used its domestic law against aerial intrusion and threats against national security to convict four U.S. Air Force officers whose aircraft had strayed into Chinese airspace. They

While one author says that the invocation of Montreal Convention's provisions against the "actions of a state's armed forces seems strained,"³⁵⁷ we must remember that the DoJ, as part of its opinion on the legality of the shootdown of drug trafficking aircraft, concluded that the ASA applies to foreign government actors as well as to terrorists.³⁵⁸ Such an application of the domestic law of another State against U.S. forces is also a possibility.

A former Clinton advisor on Cuba called the indictments of the Cuban pilots politically motivated.³⁵⁹ While this may or may not be true, it certainly leads one to question the possibility of a State indicting pilots, or others aiding pilots, who shoot down civil aircraft in another country. If it is possible for the U.S. to do it in the BTTR case, it is possible for another State to do it in the case of ABDP shootdowns, should a State be displeased enough with the operations to engage in such an act.

Professor Dempsey has noted that the divergence in legal systems has caused problems in the implementation of the Montreal Convention.

There is no uniformity in State actions regarding prosecution or extradition, and the failure of the conventions to define the term "severe penalties" has enabled several states to avoid rigorous punishment of [offenders] This allows states to comply with the literal requirements of the ... [Montreal Convention] while doing little to discourage the proscribed offenses.³⁶⁰

While this lack of uniformity has commonly been used as a means to allow terrorists to escape justice, it could also be used by States as a means to make a political statement

were sentenced to deportation and their aircraft was confiscated. See Oliver J. Lissitzyn, "Judicial Decisions", 50 A.J.I.L. 431, 442 (1956).

³⁵⁷ Linnan, "Iran Air Flight 655", *supra* note 66 at 266.

³⁵⁸ See *Opinion of the Office of Legal Counsel*, *supra* note 22 at 3.

³⁵⁹ See "U.S. Indicts Three Cubans in '96 Shootdown", [Fort Lauderdale, FL] *Sun-Sentinel* (22 August 2003) 1A.

³⁶⁰ Paul Stephen Dempsey, "Aviation Security: The Role of Law in the War Against Terrorism", (2003) 41 Colum. J. Trans. L. 649 at 672-73.

about a policy with which they do not agree. In the implementation of shootdown operations, one must keep an eye on the foreign domestic law that is or may be implemented under the Montreal Convention.

D. The “Quasi-State” Aircraft

Major General Huang Suey-sheng of the Taiwanese Air Force said prophetically, “In the wake of the 9-11 tragedy ... the distinctions between war and non-war and the differences between military and non-military have become blurred.”³⁶¹ While this observation has been made many times since the start of the “war on terror,” the general’s statements are interesting in that they came at a time when Taiwan was announcing its plans to shoot down hostile aircraft.

While the phrase “quasi-war” is typically used in U.S. Constitutional Law in reference to the Presidential powers to conduct the 18th Century “quasi-war” with France,³⁶² the term has been creeping into the “war on terror” lexicon.³⁶³ This work has been an attempt to seek international justification for the use of force against civil aircraft in the ABDP scenarios that can possibly be applied to other situations. In the absence of an application that will allow the shootdown of civil aircraft in certain threatening situations, States will seek alternative means to justify their shootdowns. With General Suey-sheng’s description of the situation involving the terrorist use of civil aircraft as a confusing distinction between that which is military and that which is civilian, we could

³⁶¹ “MND says Troops Ready for 9-11 Style Attacks” *Taiwan News Global News Wire* (12 September 2002), Online, LEXIS (News).

³⁶² See John Alan Cohan, “Legal War: When Does it Exist, and When Does it End?” (2004) 27 *Hastings Int’l & Comp. L. Rev.* 221 at 263.

³⁶³ See George P. Fletcher, “On Justice and War: Contradictions in the Proposed Military Tribunals” (2002) 25 *Harv. J. L. & Pub. Pol’y* 635 at 651, Richard J. Kozicki, “The Changed World of South Asia: Afghanistan, Pakistan, and India after September 11” (2002) 2 *Asia Pacific: Perspectives* 1 at 8, online: USFCA, <<http://www.pacificrim.usfca.edu/research/perspectives>>.

easily see the evolution from the “quasi-war” to the “quasi-state” aircraft.

As we have seen above, the protections of the Chicago Convention and of customary international law do not extend to state aircraft. International law may even permit States to use deadly force against state aircraft on sight if they are intruding into another State. It has been said that “[t]he U-2 incident [of 1960]... suggests that in some circumstances no previous warning or order to land is required by international law before an intruding foreign aircraft is shot down, even if the intruder does not itself attack or is likely to attack.”³⁶⁴ The U.S. used the state aircraft justification when it intercepted an Egypt Air 737 carrying terrorists that had hijacked the *Achille Lauro* in the Mediterranean.³⁶⁵ They simply reclassified the aircraft, which had been in service as a civilian airliner, as a state aircraft based on its mission, being chartered by the Government of Egypt to ferry a suspected terrorist out of the country. One author has even gone so far as to use a similar argument for drug trafficking aircraft. “[A]ircraft involved in illegal narcotics traffic arguably do not fall within the definition of ‘civil aircraft’ and thus the protections of the Chicago Convention do not apply to them.”³⁶⁶ This is based on the paramilitary nature of their activities.³⁶⁷

A move to classify unfriendly civil aircraft, particularly those used by terrorists, as state aircraft would certainly give States more flexibility in how they intercept and apply force to such aircraft. However, one could see such a move as being quite subject to abuse. Moreover, it could cause harm and uncertainty to the whole framework on international civil aviation based on the Chicago Convention. It would be preferable to

³⁶⁴ Oliver J. Lissitzyn, “Some legal Implications of the U-2 and RB-47 Incidents” (1962) 56 A.J.I.L. 135 at 138.

³⁶⁵ See Bourbonniere & Haack, “Military Aircraft”, *supra* note 76 at 907-08.

³⁶⁶ Stokdyk, “Shootdown Policy” *supra* note 215 at 1306.

³⁶⁷ See *ibid.*

use the existing framework of prohibitions and defenses to ensure the security of States rather than to see the phrase "state aircraft" become subject to contortions in order to meet the needs of States.

VI. Conclusion

Two things are needed in the law when it comes to the shutdown of civil aircraft. The first is the need to protect civil aircraft in flight. It would be nice, in a perfect world, to flatly prohibit such uses of force and be done with the issue; however, a policy of employing an across-the-board prohibition on the use of force against civilian aircraft is doomed to fail, even if it allows for shutdowns in self-defense. Any time a line such as self-defense is drawn, hostile forces will seek a way to circumvent it, which would negate the second requirement, the need to allow States a measure of action to protect their essential interests. This would necessitate either moving the line or doing away with the norm altogether. Such is the beauty of using the defenses offered by international law to justify an otherwise solid rule that weapons will not be used against civil aviation in flight. It permits the norm to stay intact while allowing for a case-by-case analysis of possible exceptions to the rule. The use of the defenses outlined above would allow that norm to stay intact and to meet the security needs of States. In particular, the use of the defense of necessity is by far the strongest argument to be made for the international legality of ABDP shutdowns, without a corresponding lessening of the protections accorded to international civil aviation. For their own protection and for the protection of countries around the world, international law should recognize the legality of ABDP shutdowns conducted in the Andean Region.

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